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THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1930.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98–99, FETTER LANE, LONDON, E.C. 4.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1930, will be as follows :—

In the First Series,
[1930] 1 Ch. [1930] 2 Ch.

In the Second Series,
[1930] 1 K. B. [1930] 2 K. B. [1930] P.

In the Third Series,
[1930] A. C.

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THE TOVARISCH.

C. A.
1929
Dec. 3, 4, 6.

Shipping—Collision—Flare-up Light—Green pyrotechnic Light—Regulations for Preventing Collisions at Sea, 1910, *arts.* 1, 12.

By art. 1 of the Regulations for Preventing Collisions at Sea, 1910: "The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be taken for the prescribed lights shall be exhibited." By art. 12 a vessel "may, if necessary in order to attract attention . . . . show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal."

A large four-masted barque, after seeing both side lights of an approaching steamship about one and a half to two points on the starboard bow, saw only the green light at an estimated distance of about half a mile. Thereupon a green pyrotechnic flare was exhibited on the starboard side of the barque. Immediately afterwards the steamship ported and a collision occurred in which the steamship was sunk with all hands except one:—

Held, reversing the decision of Hill J. [1929] P. 293, that it was not a breach of the regulation to exhibit a green flare, inasmuch as it could not be mistaken for one of the "prescribed lights" and the colour of the flare is not prescribed in art. 12; that a reasonably skilful seaman

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should have appreciated that the barque wished to direct special attention to her length and character; and that the steamship was alone to blame for porting and keeping her speed until just before the vessels struck.

APPEAL from a judgment of Hill J. (1) in an action of damage by collision.

The plaintiffs (respondents) were the owners of the Italian steamship *Alcantara*, a vessel of 1682 tons gross, 289 feet long; the defendants (appellants) were the owners of the Russian sailing ship *Tovarisch*, a four-masted barque of 2472 tons gross, 284 feet long. The collision occurred in hazy weather on the night of February 24, 1928, off Dungeness, when the *Alcantara* was bound up Channel to Calais, laden with mineral ore, and the *Tovarisch*, which was employed as a training ship for cadets, was bound down Channel. The *Alcantara* was struck on the port side by the bowsprit and stem of the *Tovarisch* and sank almost immediately, twenty-three out of her crew of twenty-four being drowned.

The *Tovarisch* saw both side lights of the *Alcantara* one and a half to two points on the starboard bow, and about a minute later, when the vessels were about half a mile apart, lost the red and had only the green light about two points on the starboard bow. Upon this the helm of the barque was hard-a-starboarded, and a green pyrotechnic light was lit and exhibited from the starboard side of her bridge. Thereupon the steamship ported her helm, and when her red light reopened to those on the *Tovarisch* the helm of the barque was hard-a-ported, and the collision happened.

Hill J. held that the exhibition of the green pyrotechnic light was not authorized by the Regulations for Preventing Collisions at Sea, 1910; that a "flare-up light" meant a light produced by setting fire to something which would burn with an ordinary flame and did not include coloured flames; and that the *Alcantara* was not to blame for porting, the Elder Brethren being of opinion that they would have regarded the exhibition of the flare as "an imperative demand to take action—a warning to the *Alcantara* that she was

(1) [1929] P. 293.

doing something dangerous, and an urgent call to her to do something different." He held the *Tovarisch* alone to blame.

The defendants appealed.

Dunlop K.C., *Stranger* and *Krougliakoff* for the appellants. The exhibition of the green flare was not a breach of art. 12 of the regulations, which does not mention the colour of the light, and therefore leaves it to the discretion of those in charge of the vessel to exhibit an appropriate signal from an appropriate place. Although not a breach of the article it might, for example, be bad seamanship to exhibit a green flare from the port side of a vessel or a red flare from the starboard side. But where the regulations intend that the light to be shown shall be a white light they say so: see, for example, art. 9 (*d*) (2.). The flare-up light, therefore, can be of any description and colour provided it "cannot be mistaken for any of the prescribed lights" (art. 1); and the green flare shown by the *Tovarisch* could not have been mistaken for any prescribed light. It was a reasonable precaution taken to attract the attention of the *Alcantara*, which was approaching on too close a bearing, to pay attention to the fact that the *Tovarisch* was not a small fishing vessel but a large sailing ship approaching at substantial speed and with a considerable part of her length abaft the position of the starboard light; and the *Alcantara* took the worst possible action in porting, and, until the last moment, maintaining her speed.

Langton K.C., *E. Aylmer Digby K.C.* and *Cyril Miller* for the respondents. A flare-up light, showing, as it does, all round the horizon, must mean a light which burns with an ordinary and not a coloured flame. Suppose the green flare had been seen by a vessel coming up astern of the *Tovarisch*. It would have been most confusing to her and may equally have confused the *Alcantara* and led those in charge of her—not to port into the *Tovarisch* to their knowledge—but to port to clear a vessel which they may have thought was a fishing vessel and wished to indicate that she had nets out on her starboard side. The *Tovarisch* was not a particularly large sailing ship, and, even if she were, had no right by private enterprise to add to the regulation lights in order to show that she was a long ship. The green flare would most probably obliterate the less brilliant starboard light, and if so the *Tovarisch* would not be complying with art. 5 of the regulations. The vessels were green to green, it was not "necessary . . . . to attract attention" and all the *Tovarisch* had to do was to keep her course, instead of which she exhibited a flare, first starboarded and then ported, and is to blame in each of these respects.

Dunlop K.C. replied.

SCRUTTON L.J. This case is one of some difficulty owing to two rather unusual features. In the first place, unfortunately, almost the whole of the people who could give evidence as to the proceedings on one of the ships, as being on board that ship, are drowned. Consequently, with the exception of one man from the engine room who ran up on deck and caught the bowsprit of the other ship as it stuck over his deck, no one else on board the steamship was available as a witness, and the Court has to make up its mind as to what happened with only the evidence from one of the ships. To one side that may be some advantage, inasmuch as unfortunately in the Admiralty Court one does not always get the whole truth from every witness, but, on the other hand, undoubtedly the steamer that is lost is at a disadvantage in not having anybody to contradict the story told by the witnesses on the other side, who, unfortunately, can feel that they have a free hand. The other somewhat unusual feature is this, that very great importance is attached in the judgment below, both by the judge and the Elder Brethren, to the rather unusual incident, in my experience, of a green flare being burnt in the course of the proceedings on the ship that survived; and the questions as to the right to burn a green flare, and the effect which ought to be produced on those in charge of the other vessel on seeing a green flare, are undoubtedly somewhat novel in the practice of the Admiralty Court.

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THE TOVARISCH.

Scrutton L.J.

The learned judge, as I read his judgment, has not said that he accepts the whole story of the surviving ship. He has said what the story of the surviving ship was, and he has drawn certain inferences from it, but he has not, as I follow his judgment, said expressly, or explicitly : "I accept all the story of the surviving ship."

The collision takes places on a hazy, dark night in the English Channel, off Dungeness, between a sailing ship which is being used as a training ship for cadets by the merchant marine of the Soviet Government and an Italian steamer, the *Alcantara*. The *Tovarisch*, a four-masted sailing ship nearly 300 feet long, on the night in question, not carrying any sails on her aft mast, is coming down Channel on a course of S. 60° W. The *Alcantara*, bound up Channel to Calais, and very likely having made a course to pass south of the Varne light, is on a course of nearly 80° E., and, I think, the learned judge accepts the view that the *Alcantara*, when she is seen by those on the *Tovarisch*, is about three-quarters of a mile distant—but of course the distances must be always a matter of guess work—showing her masthead light and her two side lights to the *Tovarisch*. Shortly afterwards she shuts in her red. That may be due to her changing her course by starboarding, or to the *Tovarisch* proceeding on her course and working ahead on the line of course of the *Alcantara*, or it may be due to both. Having shut in her red, the two vessels become green to green, and, at that stage, the *Tovarisch* does what the learned judge, I think, regards as the vital point in the case. The *Tovarisch's* green screened light being comparatively near her bows, the officer, who was on a bridge which had been erected somewhere near her third mast (what he calls the second main mast), burns, on her starboard side, a green flare, so that if the *Tovarisch's* green forward light was showing there are two green lights burning on her starboard side (the lamp and the green flare) and there is, undoubtedly, a question as to exactly how the green flare would show on the sails of her main mast and second main mast—her second and third masts.

The learned judge has obviously been much interested in the appearance and disappearance of various flares

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from the regulations, and he has devoted some two or three pages of his judgment to a very careful and industrious —and I have no doubt accurate—history of the appearance and disappearance in the regulations of various flares, and various coloured lights. I am more concerned with the position of the regulations as they stood at the time the *Tovarisch* exhibited her green flare. One of the most relevant regulations appears to me to be the first, which is the first rule of the group relating to lights. "Rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights, which may be mistaken for the prescribed lights, shall be exhibited." In my view that is only a prohibition of lights which may be mistaken for the prescribed lights. When one comes to think of it it must be so. Take the case of a liner coming down Channel, how many hundred lights does she exhibit? A light in every port hole, lights from every deck cabin, all sorts of lights besides the prescribed lights, and she is not breaking any regulation, because they cannot be mistaken for the prescribed lights—the green and red side lights and the one or two masthead lights, according to her length. I am unable to read art. 1 as being a rule prohibiting all lights other than the prescribed lights—it does not say so. It does prohibit all other lights which may be mistaken for the prescribed lights, and I asked myself this—for what prescribed light is a green flare, exhibited on the starboard side, likely to be mistaken? After listening to the various ingenious speculations that counsel, from their knowledge of the matter, have provided, my answer is "none," I do not see any prescribed light for which a green flare aft on the starboard side can be mistaken. I am invited to look at art. 12: "Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light, or use any detonating signal that cannot be mistaken for a distress signal." The article, therefore, contemplates that if it is necessary to attract attention a flare-up light may be used—which must be read with art. 1, which prescribes that you must not use a flare-up light which may be mistaken for one of the prescribed lights. The learned judge asked the Trinity Masters to advise him: "What was the *Alcantara* to think of it? I have asked the Elder Brethren. They say they would have regarded it as an imperative demand to take action—a warning to the *Alcantara* that she was doing something dangerous, and an urgent call to her to do something different." We are not treating this case as an appeal from assessors to assessors: the House of Lords has told us we must not do so. We are endeavouring to follow the instructions of the House of Lords in *The Australia* (*Owners*) v. *The Nautilus* (*Owners of cargo*) (1), and the cases reported as a note to that case in the Law Reports, that we are the judges, and we are to regard the gentlemen who assist us—and the gentlemen who assisted the judge below—as witnesses, and we are to form our opinion, as judges, on the combined evidence of the four witnesses, and not take the view that because the two witnesses whom we see contradict the two witnesses whom we have not seen, we should follow the witnesses whom we see rather than the witnesses whom we do not see.

It is necessary to point out that the four assessors are a very peculiar sort of witnesses. The judge in the Admiralty Court talks to them, and gets information from them. The parties do not know what the witnesses are telling the judge; they have no opportunity of cross-examining the so-called witnesses. Indeed, in the Admiralty Court, the practice is not followed which we—in obedience to the direction of the House of Lords—follow, the practice of asking questions in writing, and obtaining answers in writing, and sending them up to the superior Court. We do not know the terms of the questions except from what the learned judge says in his judgment. One starts, therefore, with two witnesses whose evidence the parties do not hear, and whom the parties have no opportunity of cross-examining, and the case then comes to this Court, and we have to decide the case with two witnesses whom the judge below did not hear. We do in this Court—since the House

(1) [1927] A. C. 145.

of Lords has requested us to do so—put questions in writing and obtain answers in writing, which are available for the parties and for the House of Lords; but, again, the parties have no opportunity of cross-examining these so-called witnesses, and it appears to me to be very odd that we are dependent on the evidence of witnesses whose evidence is not given to the parties, and whom the parties have no opportunity of cross-examining. However, we endeavour to follow the instructions of the House of Lords, and treat them as witnesses, and form our judgment on the evidence they give between them. As to showing the green flare, we have asked our particular witnesses: "What information, if any, would a reasonably skilful seaman obtain from the *Tovarisch's* burning a green flare aft to a steamer then green to green?" The gentlemen who assist us answer: "He"—that is the reasonably skilful seaman—"ought to grasp that here was a ship that wished to direct special attention to herself and was using the best available method of showing her character." We read that answer as meaning that she is showing her character by showing that she is a long sailing ship, possibly by being lit aft, directing more light on the sails than the green forward side light would do. I cannot see in that—in view of art. 12—any breach of any regulation, and I, therefore, start with a green flare shown to call attention in the best available way to the character of the *Tovarisch.*

Then comes the next, and to my view, the cardinal statement in the case, that when the green flare was burnt the *Alcantara* ported, hard-a-ported, and did not, at that time, take any action with her engines. She stopped later, she never reversed. The learned judge said that in these circumstances the Elder Brethren would have regarded the green flare as "an urgent call to her to do something different" from what she was doing. What she was doing at that time was passing green to green. "In these circumstances they are of opinion that the *Alcantara* could not be blamed for porting or hard-a-porting; so also with regard to the engines, they think the *Alcantara* cannot be blamed for stopping instead of reversing. The master of the *Alcantara* would be right if he thought 'I may be wrong if I keep ahead, I may be wrong if I go astern; I will stop and see.' What the *Alcantara* did contributed in fact to the collision, but it was not the fault of the *Alcantara* that she did it. The burning of the green light was the cause, and was negligent, and the *Tovarisch* is to blame." (1) I understand that statement of the learned judge, who heard the witnesses who sat beside him, to be that showing a green flare tells you to do something that you are not doing at present, and was the cause of the *Alcantara* porting, and crossing the bows of the sailing ship, which the *Alcantara* is forbidden by the regulations to do, and, therefore, the *Tovarisch* is to blame. Without any more witnesses I am quite unable to understand that. I cannot understand, having listened, with all the intelligence I can, to the illuminating addresses of counsel, why burning a green flare tells you to break a regulation by coming ahead of a sailing ship. I can understand the suggestion that burning a green flare may tell you not to go too close astern of the green light, because that light is on a long sailing ship. But I cannot understand how burning a green flare tells you to cross the bows of an approaching sailing ship. However, I have to attend to the witnesses rather than use my own nautical skill, and we, accordingly, asked the gentlemen who advise us this question: "Was the *Alcantara* guilty of any breach of reasonably skilful seamanship when, green to green, she saw the green flare and (1.) ported?" and they answer "Yes"; "(2.) did not reverse at all or stop engines till just before the collision?" and they answer again "Yes." Considering the four witnesses, and the view of the judge below, I come to the conclusion—which I had already come to before our witnesses answered that question—that the *Alcantara*, in porting, was guilty—as indeed the judge says—was guilty of something that was the cause of the collision, and had no excuse, as a matter of seamanship, for porting in front of the advancing sailing ship.

(1) [1929] P. 293, 303.

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There remains the question, the *Alcantara* being thus to blame, what about the *Tovarisch?* The *Tovarisch* at the time she lighted the green flare, hard-a-starboarded. That is to say she did not keep her course, and when the red opened again on the *Alcantara*, and the one blast was blown, showing that the *Alcantara* was crossing the bows, the *Tovarisch*, instead of continuing her hard-a-starboard movement, put her helm hard-a-port. It is suggested, and it may be so, that she altered about half a point under her hard-a-starboard helm, and about a point back under her hard-a-port helm, and the collision which actually happened was at angle of 45 degrees leading aft. If, therefore, her hard-a-port helm had worked a little longer possibly she might have escaped the collision. On the other hand, it is suggested that if, instead of hard-a-porting, she had kept on with her hard-a-starboard helm she might have got through just parallel with the vessel that was crossing her bows. It does not seem to me—and I am advised—that the hard-a-starboarding had anything to do with the collision. I have had doubts, left to myself, whether the hard-a-porting was right, or whether its absence would have avoided the collision; but again, we have asked the witnesses whom we have here this question: "Was the *Tovarisch* guilty of any breach of reasonably skilful seamanship: (1.) in not keeping her course, but putting the helm hard-a-starboard, and showing a green flare, when the vessels were green to green?" and they answer "No"; "(2.) When she saw the *Alcantara* porting, and her red light opening again a minute before collision, or a little more, in hard-a-porting, and not continuing her hard-a-starboarding?" Again they answer "No." The witnesses below had answered the question in this way. The Judge says: "Whether the *Tovarisch* was justified in starboarding immediately she lost the red light depends on whether the risk was finally at an end. The position was similar to that of steamships on crossing courses, where the duty of the stand-on ship to keep course and speed continues until the ships have definitely passed out of the phase of crossing ships: see *The Orduna*. (1) The Elder Brethren

(1) [1919] P. 381; [1921] 1 A. C. 250.

are of opinion that it was not right for the *Tovarisch* to starboard as soon as she did. It is a difficult question, and I need not decide it." (1) Thus the two witnesses below gave one opinion, and the two witnesses above give another opinion. The judge himself did not decide the question at all; what he would have done if he had heard the two witnesses above I do not know. I, having heard the four witnesses, on a matter on which I should hardly feel myself competent to form a very decided opinion, adopt the view of the two witnesses who are here advising us. Then the judgment goes on: "As to the hard-a-porting of the *Tovarisch* the Elder Brethren advise me, and I entirely agree, that it was the worst thing the *Tovarisch* could have done." The learned judge accepts their view. If by hard-a-starboarding the *Tovarisch* would have got parallel with the *Alcantara*—if that were the fact—then, of course, it seems to me that hard-a-porting was the wrong thing to do; but considering in the best way I can the contradictory opinions I have received, I am not satisfied that the hard-a-starboarding by itself would have avoided the collision. I think it is much more likely that it would have produced either a right-angle blow or a blow leading aft at very nearly a right-angle, and, if so, the collision would have been just as bad as it was, in the result that happened—namely, the vessel would have gone to the bottom in the same way.

Having given the best consideration I can to the evidence of the cloud of witnesses with which I am encompassed, I come to the conclusion that the *Tovarisch* is not to blame, and the *Alcantara* is to blame. The result, therefore, is that the claim fails, the counterclaim succeeds, and there must be judgment for the *Tovarisch* on the claim and the counterclaim.

LAWRENCE L.J. I agree, and but for the fact that we are differing from the decision of the learned judge in the Court below, I should have contented myself with simply expressing my concurrence with the judgment of my Lord;

(1) [1929] P. 293, 304.

out of respect, however, for the learned judge I will add a few words of my own.

The first question which calls for determination is whether the regulations prohibit the showing of a green flare-up light. The answer to this question depends upon the true meaning of arts. 1 and 12. Art. 1 provides that the rules concerning lights shall be complied with in all weathers from sunset to sunrise and during such time no other lights, which may be mistaken for the prescribed lights, shall be exhibited. I read that, not as a prohibition against showing any lights other than the prescribed lights, but only as a prohibition against the exhibition of such other lights as might be mistaken for the prescribed lights, thus impliedly authorizing the exhibition of any lights which might not be so mistaken. Art. 12 expressly authorizes the showing of a flare-up light or the use of any detonating signal that cannot be mistaken for a distress signal, if necessary, in order to attract attention, and in addition to the lights which, by the rules, are required to be carried. Hill J. has held that the only flare-up light authorized by this article is a white (or possibly a blue) flare-up light, and consequently that the *Tovarisch* committed a breach of the regulations, by showing a green flare-up light. In arriving at this conclusion the learned judge has founded himself upon a review of the relevant earlier regulations from the year 1863 down to the present time. In my judgment, that course, however interesting from the student's point of view, is not the proper way of construing the regulations of 1910 which, it must be borne in mind, were the only regulations governing at the time, and have to be observed not only by British but also by foreign seamen. I think it is too much to expect from either a British or foreign seaman that he should have all the earlier regulations in mind. His only duty is to study and observe the present regulations, and to act according to the directions which on their true construction are thereby given. It is to be observed that art. 12 imposes no condition as to the colour of the flare-up light which may be used. Whenever a light of a particular colour is required to be shown the regulations indicate that colour. For instance, in art. 2 the colours of the side lights, and the colour of the masthead light are definitely prescribed. The learned judge held that with regard to flare-up lights there was no necessity to prescribe the colour, because such lights must necessarily be of a white (or blue) colour. That view is in my opinion mistaken, and moreover is negatived by the provision in art. 9 (*d*), para. 2, that, in certain events, a sailing vessel is to show a white flare-up light or torch, thus indicating that the regulations contemplate that there may be flare-up lights of other colours than white.

The conclusion I have come to is that, on the true construction of the regulations there is no prohibition against showing a flare-up light of any colour, always bearing in mind that under art. 1 every light shown must be of such a character as not to be mistaken for one of the prescribed lights. In the present case there is no evidence, or even suggestion, that the green flare displayed by the *Tovarisch* was, or could be, mistaken for one of the prescribed lights, and I have, therefore, come to the conclusion that the *Tovarisch* did not commit a breach of the regulations in so far as the colour of the flare-up light is concerned.

The other questions in this case are questions which relate to the conduct of the respective officers in charge of the two ships, and to the navigation of those ships, and I confess to having felt considerable hesitation in differing, on matters of that kind, from the judgment of the experienced judge in the Court below, arrived at with assistance of the Elder Brethren. But having had the assistance of counsel and assessors, I am encouraged to express my own views, especially as the judgment which has just been delivered by my Lord agrees entirely with the opinion which I formed during the progress of the case in this Court.

In the first place, dealing with the flare-up light exhibited by the *Tovarisch*, Mr. Langton has argued that the *Tovarisch* ought not to have exhibited any flare-up light at all, as, at the time when it was exhibited, there was no necessity to call the attention of the *Alcantara* to the *Tovarisch*. The officer in charge of the *Tovarisch* who showed the flare justified his

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action on the ground that, as the *Alcantara* was approaching somewhat close to the *Tovarisch*, he desired to call attention to the length and character of his ship in case the *Alcantara* might attempt to pass too close under her stern. We have had advice on that matter, and it seems to me that it cannot properly be said that in the circumstances the showing of a flare was an unreasonable act on the part of the officer in charge of the *Tovarisch*. It may not have been absolutely necessary at the time, because the vessels were green to green, but the action was one which in my opinion an officer in charge of such a vessel might reasonably have taken. That being so, I have come to the conclusion that the action of the officer in charge of the *Tovarisch*, in showing a green flare-up light at the time when he did, was justified.

As to the action taken by the *Alcantara*; she, immediately on seeing the green flare-up light on the *Tovarisch*, hard-a-ported, keeping her speed. I confess that I have throughout been, and still am, totally at a loss to understand how such action could be justified. She was green to green with a sailing ship close on her starboard bow. That sailing ship showed a green flare. Assuming that the flare puzzled her, or was treated as a demand to take some immediate action, I cannot think that it justified her in steering straight into, or right across, the bows of the sailing ship. At most it could only properly be taken as a demand on her to stop or reverse, or possibly to sheer off by starboarding. It is suggested by Mr. Langton that the flare-up light might have indicated to the *Alcantara* that there were nets ahead which she ought to avoid. That suggestion seems to me far-fetched, and somewhat fantastical. In the result I am of opinion that the *Alcantara* was to blame for the action she took on seeing the flare.

As to the *Tovarisch*; simultaneously with the green flare-up light, she hard-a-starboarded. At that time the vessels were green to green, and I think there is a good deal in Mr. Dunlop's contention that the vessels never were crossing vessels within the definition of the rule, and that if they had at any time been crossing vessels, that phase had passed when the

Tovarisch hard-a-starboarded. Be that as it may, however, we have been advised, and it seems to me common sense, that the *Tovarisch* in hard-a-starboarding, was not in any way endangering her own safety, or the safety of the vessel on her starboard bow. By starboarding she was sheering away from that vessel, and even if they were crossing vessels and the crossing phase were not quite over, her helm action would in no way embarrass the approaching ship; on the contrary, it would give her more room than she had before. In my opinion, therefore, no blame attaches to the *Tovarisch* for her helm action at that stage, nor can that helm action be made use of, as Mr. Langton sought to do, for the contention that it subsequently prevented the *Tovarisch* coming over to starboard under port helm as quickly as she would otherwise have been able to do.

The learned judge has held the *Tovarisch* to blame for not continuing on her hard-a-starboard helm when the *Alcantara* hard-a-ported, and was coming into her or across her bows. Mr. Langton has frankly stated that that was not a point which he made at the trial, and that his contentions throughout were, first, that the *Tovarisch* ought not to have hard-a-starboarded in the first instance, and, secondly, that when the collision was imminent she ported too soon. In other words, his point was that she ought to have kept her course in the first instance and not hard-a-starboarded, and, secondly, that she ought to have kept her course when the critical moment came, and not then hard-a-ported. On the advice that we have received it seems to me that whatever action the *Tovarisch* might have taken or omitted to take after the *Alcantara* hard-a-ported would not have avoided the collision. No doubt if the *Tovarisch* had taken one or other of the courses suggested by counsel for the respondents or by the learned judge the collision would have been different in character, as she would either have been run into by the *Alcantara* or would have struck the *Alcantara* at a different angle and in a different place; but it is plain to my mind on the evidence that a collision was inevitable after the helm action taken by the *Alcantara*. Personally I am not sufficiently versed in these matters to say what was the best action that the *Tovarisch* could have taken, when the red light of the *Alcantara* opened up, and she heard the blast which signalled to her that that vessel was porting, but we have been advised—and I think rightly—that the *Tovarisch*, in the circumstances, was not to blame for hard-a-porting, instead of keeping her course or continuing her hard-a-starboarding.

In the result, for the reasons stated, I agree with the judgment of my Lord that the *Alcantara* was alone to blame and that this appeal ought to be allowed.

GREER L.J. I also have come to the conclusion that this appeal ought to be allowed and a declaration made, with its usual consequences, that the *Alcantara* was solely to blame for the collision between her and the *Tovarisch*. The allegations against the conduct of the *Tovarisch* seem to me to have been four; first it is said she showed a green flare-up light when, if she ought to have shown a light at all, it ought to have been a white flare-up light. Secondly, it is said that, whether green or white, she ought not to have shown a flare at all. Thirdly, it is said that she was guilty of bad seamanship in starboarding when she did. And, lastly, she was guilty of bad seamanship in porting when she did. I have come to a conclusion unfavourable to these contentions, independently of the answers given to the questions which have been put in writing to our assessors, and those answers confirm the view that I had taken upon the evidence and the arguments presented to this Court.

First, with regard to the colour of the flare, I cannot help thinking that the learned judge was somewhat misled by his investigations into the history of the regulations, so far as they were concerned with flares, and did not, therefore, give adequate attention to the wording of the regulations themselves. The regulations material to this question are arts. 1, 9 and 12. Art. 1 provides that no lights shall be shown which are capable of being mistaken for the prescribed lights. Art. 9 provides what the lights are to be for fishing vessels

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and, in sub-s. (*d*) (2.) of art. 9, we find these words: "Sailing vessels"—that is to say fishing vessels if they are sailing vessels—"shall carry a white light in a lantern so constructed as to show a clear uniform and unbroken light all round the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision." Art. 12 provides that "Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal." Now I can conceive that if the *Tovarisch* had burnt a white flare it would have been at once alleged: "You have broken art. 1, because you have led those on the look out for you to think that you are a fishing vessel and are showing a flare under the provisions of art. 9." So much for the colour of the light. I cannot help thinking that only where the articles provide what the colour of the light is to be, is there any prescribed colour. There is no prescribed colour in art. 12 unless, by reason of the other two articles, one reads art. 12 as prescribing that, at any rate, it must not be a white light because, otherwise, it might be mistaken for the flare of a fishing vessel. Then it is said that they should not have shown a flare of any sort. I read art. 12 as meaning this—not that they are only to show such a light if a collision is inevitable in the absence of their showing such a light, but also if, to those on board it rightly appears reasonably necessary to call attention to their presence, or to their character. It cannot be that the master of a vessel is to be under an obligation to act, and to act only where it is absolutely necessary, to avoid collision, that he should so act. The words must be read as meaning "every vessel may, if reasonably necessary, in order to attract attention." In taking that view one must not forget, of course, that the whole object of these regulations is, as shown by their title, the prevention of collisions at sea, and a vessel must not, where there is no risk whatever of collision, take it that it is necessary for her to exhibit a flare-up light. But if there is

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a possibility that her position and character may not be understood, then, it seems to me, it may be deemed reasonably necessary to show the flare provided for by art. 12, and I agree with the view expressed by our assessors that, in this case, it was necessary in order to indicate, to the approaching steamer, that the vessel was not a short sailing vessel—short in length—as she might well have been from the mere observation of the green light, but that she was a long vessel, which had, in addition to the part of her which was forward of the green light, a very large part of her abaft the green light which it was as desirable to protect from collision as that which was forward of the position of the green light.

The next matter to consider is the starboarding. I agree with the argument presented by Mr. Dunlop that, at the time it took place, there was nothing wrong with the starboarding. If both vessels kept their course there was, at that time, no risk of collision whatever, and the sailing vessel was entitled to starboard there just as she was—if she had been half a mile away—entitled to starboard for any purpose she considered desirable in her own interests. It may have made a collision with the other vessel less likely, and it was not an improper manœuvre. With regard to the porting, I am considerably influenced by the course which this trial took. I look at the statement of claim on behalf of the *Alcantara* and there I find what is complained of is this: "Having starboarded, improperly failed and neglected to port their helm in due time or at all." I understand that as covering two allegations. (1.) That she did not port at all, and (2.) that she did not port soon enough. I do not understand it as containing any allegation that she ought not to have ported at all; the complaint that she did not port cannot be a complaint that she ought not to have ported at all. It is a complaint that she neglected to port at all, or if she did port she did not do it soon enough, and I gather that no question in the course of the hearing was put to the master to indicate to him that he was charged with improper conduct in not holding on to his starboard helm. But be that as it may, I am satisfied by the way in which this case has been presented to us, and

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the evidence that has been given, and the opinions which we have received from the assessors, that failing to port and keeping on the starboard helm, would not have prevented this collision. It would have happened, perhaps in a different way, and, possibly, with different results as to the damages, but it would have happened. I am also satisfied that the porting of the *Tovarisch*, when it took place, was a reasonable step to prevent the collision being as damaging to the *Tovarisch* as it might have been if the vessel had not ported at all.

For these reasons I think the appeal should be allowed.

SCRUTTON L.J. The judgments of my brothers have recalled to my mind that I did not say what I had meant to say when I started my judgment, on the question of porting. In my view, porting was not alleged as a breach originally. It is clear that no amendment was ever made formally to include such a breach. It is also clear to me, having looked at the judge's notes, that Mr. Langton, having opened the case for the *Alcantara*, never alleged it as a breach; and also that it was never put to the master in such a way as to get his defence on the point. Under these circumstances, I do not think the judge ought to have dealt with it. I do not think the judge ought to find a vessel in fault for a matter which was never alleged by the parties alleging fault, unless the pleading has been amended, and a clear opportunity has been given to those affected of dealing with the charge.

Appeal allowed.

Solicitors for the appellants: *Middleton, Lewis & Clarke.*

Solicitors for the respondents: *Richards, Butler, Stokes & Woodham Smith.*

E. C. M. T.

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Nov. 27;
Dec. 4.

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Shipping—Wages—Wreck of Ship—Unemployed Seaman—Merchant Shipping (International Labour Conventions) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1, *sub-s.* 1.

By s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925, " where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall . . . . be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date," unless (sub-s. 2) " the owner shows that the unemployment was not due to the wreck or loss of the ship," or that in respect of any day " the seaman was able to obtain suitable employment on that day ":—

Held (i.), that the section does not merely give an indemnity against unemployment for the period between the date of the actual termination of the services and the date on which the services would have terminated had there been no wreck, but entitled the seaman to compensation for loss of employment for a maximum period of two months from the date of the wreck; and (ii.) that the compensation is limited to wages and does not include subsistence allowance.

SEAMEN'S WAGES.

These actions, tried together, raised a question under s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925, as to a seaman's right to wages and subsistence after his services have been terminated by the wreck or loss of the vessel on which he was employed.

The plaintiff in the first action was John Murray, quartermaster and able-bodied seaman on the steamship *Croxteth Hall*, owned by Ellerman Lines, Ld., which was wrecked off Flushing on February 27, 1929. The plaintiff claimed loss of wages and loss of subsistence allowance for two months—total 31*l*. 4*s*.

In the second action the plaintiff was Joseph Comerford, refrigerating greaser and seaman on the White Star liner *Celtic*, which was wrecked when entering Queenstown on December 10, 1928. He claimed in respect of the like period 33*l*. 8*s*.

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Both cases had been referred to the Admiralty Division by a Court of summary jurisdiction at Liverpool under s. 165 of the Merchant Shipping Act, 1894. (1)

Sect. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925, provides: "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date." (2) Sub-s. 2 provides that "a seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."

The defendants, the Ellerman Lines, Ld., alleged that the *Croxteth Hall* would have arrived at Middlesbrough on March 10, 1929, and on that date the voyage in respect of which the plaintiff Murray's agreement was made would have terminated, and that the plaintiff had been paid wages up to that date. They further, and in the alternative, contended that any claim under the statute was limited to an indemnity against unemployment resulting from the loss of the *Croxteth Hall*, and therefore could not exceed the amount of the wages the plaintiff would have earned up to the time when he would have been paid off. They also alleged that the plaintiff could have obtained employment. The defence of the defendants, the White Star Line, in Comerford's action was to similar effect.

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(1) Sect. 165 provides that: "A proceeding for the recovery of wages not exceeding 50*l.* shall not be instituted by or on behalf of any seaman . . . . as an Admiralty proceeding in any Court having Admiralty jurisdiction in [Her Majesty's] dominions, except (iii.) where a Court of summary jurisdiction acting under the authority of this Act, refers the claim to any such Court."

(2) Sect. 158 provides that: "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship . . . . he shall be entitled to wages up to the time of such termination, but not for any longer period."

Langton K.C. and *Lynskey* for the plaintiff Murray; *Fraser Harrison* for the plaintiff Comerford.

Dunlop K.C. and *A. J. Hodgson* for the defendants in both actions.

[In the course of the arguments, which sufficiently appear from the judgments, reference was made to *The Scarsdale* (1); and *The Olympic.* (2)]

Cur. adv. vult.

Dec. 4. THE PRESIDENT (LORD MERRIVALE) read the following judgments.

THE CROXTETH HALL.

John Murray, who is the claimant in these proceedings, was shipped as an able seaman and quartermaster on the steamship *Croxteth Hall* for what is described in the articles as "a voyage of not exceeding two years duration to any ports within the limits of 75° N. and 60° S. latitude commencing at Manchester, proceeding thence to Persian Gulf and/or any other ports within the above limits, trading in any rotation and to end at such port in the United Kingdom or continent of Europe within home trade limits as may be required by the master." The date of commencement of the voyage was October 29, 1928. It was in progress homeward when the *Croxteth Hall* was wrecked on the coast of Holland on February 28, 1929. With other members of the crew Murray was brought back at the owners' expense to Liverpool by March 4 and paid off, wages being paid up to and including March 6.

Had the *Croxteth Hall* proceeded on her voyage without mishap she would have gone on to Middlesbrough, where she was due to arrive not later that March 11. There the voyage would have ended, and subject to any new agreement

(1) [1906] P. 103. (2) [1913] P. 92.

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or agreements, Murray and the other members of the crew would have been discharged from further service under the articles in question.

Murray's home address as shown by the articles was Rock Ferry. On being paid off he proceeded to Rock Ferry and was living there during several ensuing months, out of work and seeking in Liverpool and Birkenhead a like berth to that he had had on board the *Croxteth Hall*. He did not at that time secure employment.

On March 19 the local secretary of the Transport and General Workers' Union, of which Murray was a member, addressed to the defendants' manager an inquiry as to their readiness to indemnify him for loss of employment by reason of the wreck, indicating a probable claim under the Merchant Shipping (International Labour Conventions) Act, 1925. This inquiry elicited a letter of the defendants' solicitors, in its material terms as follows: "We are instructed that your three members were paid off at Liverpool up to and including 4th ultimo. We are further instructed that in any event the services of your members would have terminated at Middlesbrough before 12th ultimo. In these circumstances it would appear to us that any unemployment of your members after 12th ultimo was not due to the wreck or loss of the ship and the case falls within sub-section 2 of section 1 of the Merchant Shipping (International Labour Conventions) Act, 1925. Our clients are therefore prepared to pay your members wages for the period 5th March to 12th March inclusive and we shall be glad to hear from you whether our clients are to send the amount in question to you or to your members direct. In the latter event you will no doubt furnish us with their addresses."

Reference was made in the solicitors' letter to a form of statutory release signed by the plaintiff when he was paid off on March 4. This, however, does not need to be set out. At the trial it was not relied upon.

Other correspondence ensued, and in May the plaintiff's solicitors took proceedings before the stipendiary magistrate at Liverpool, claiming under the Act of 1925 two months wages at the rate fixed by the articles, and subsistence money for the same period at 4*s*. a day. Murray's was not the only claim before the learned magistrate. As has appeared already, members of the crew of the *Croxteth Hall* were members of the same union and were claimants. Concurrently with these claims, there had arisen claims of a very large body of seamen, members of the crew of the White Star Company's steamship *Celtic* wrecked near Queenstown in December, 1928, of whom Joseph Comerford was one.

Murray's case, and Comerford's case, which must be specifically dealt with later, were brought to a hearing before the learned stipendiary magistrate. In both cases evidence was taken and arguments heard, and both were eventually referred by the learned magistrate to this Division.

On the plaintiff Murray's part—by the pleadings which were delivered, and in the arguments advanced by his counsel —the main contention is that his service having terminated before the date contemplated in his agreement, his right to wages at the contract rate for each day on which he was unemployed, during two months from the termination of the service, is an absolute right by virtue of s. 1, sub-s. 1, of the statute, subject only to be displaced or reduced as to any day in respect of which under sub-s. 2 the owners might show that he was on that day able to obtain suitable employment. A further contention is raised, to the effect that but for the loss of the *Croxteth Hall* Murray would have continued in the employment of the defendants for at least two months after March 4, and indeed in all probability for a period not yet terminated, at wages of 9*l*. 10*s*. a month, with keep when on board, or subsistence allowance of 4*s*. a day during times when he should be " working by " the ship between voyages. Plaintiff was allowed to give some evidence de bene esse as to the footing on which he had been during some years a usual member of the ship's company of the *Croxteth Hall*, and in proof of an invitation to " stand by " the ship while in port at Middlesbrough given to him by the chief officer while they were homeward bound.

As to the main question, the defendants assert that any unemployment of the plaintiff after March 10 was not due to the loss of the ship. " On March 10," they say, " the *Croxteth Hall* would have arrived at Middlesbrough, and on that date the voyage in respect of which the agreement was made would have ended and the crew including the plaintiff would have been discharged." Alternatively they contend that any claim under the Act of 1925 is by the Act limited to indemnity against unemployment resulting from the loss of the ship, and consequently could not exceed the amount of the wages plaintiff might have earned in the period expiring with the date on which—the ship being safe—he would have been paid off. The defendants, I may mention now, produced a good deal of evidence as to vacancies for employment in steamers of like character to the *Croxteth Hall* at Liverpool and Birkenhead during the two months after March 4, and they claim to have shown that Murray had abundant opportunities of employment and could have secured it, at any rate for part of the time in question. As to this matter, however, I find against them. They did not satisfy me there were any days within the two months on which Murray was able to obtain suitable employment.

As to the plaintiff's subsidiary grounds of claim, defendants resist in limine the consideration of any claim arising outside the ship's articles, either from the course of dealing of the defendants with the plaintiff or upon any proposal made or expectation held out to him during the voyage in question. These subsidiary claims can be concisely disposed of. As to employment other than that provided for by the articles, which Murray would probably have had if the *Croxteth Hall* had not been lost, the articles constitute the agreement with which the statute deals in s. 1, sub-ss. 1, 2; the service terminated by the wreck was his service under the articles; and although the words " unemployment indemnity " occur in the title, preamble and First Schedule of the Act, its operative effect is not by means of these words extended beyond the terms of the express provisions in s. 1. The claim for subsistence allowance in addition to wages, on the ground that the seamen's remuneration under the articles included his "keep," was not seriously pressed, and, in my opinion, could not be sustained. The language of the section excludes the claim. The crew are to serve on board, and in consideration of their service, as the articles state, "the master . . . . agrees to pay to the . . . . crew as wages the sums against their names respectively expressed and to supply them with provisions according to the scale." "Wages" at the rate to which the seaman was entitled under the articles is what the section, within restricted limits, entitles him to receive during a possible two months of unavoidable unemployment.

As to the main controversy, Mr. Dunlop argued for the defendants that what the statute gives the seaman is indemnity against unavoidable unemployment between the actual termination of the service and the date on which the service would have expired had there been no wreck. That contention he supported by reference to the terms of the title, preamble and first schedule of the statute, and, in particular, the use of the word "indemnity," in the view that a claim for indemnity could only take effect for the period provided for in the contract. The true meaning of the section, it was said, would be apparent if there were read into it after the word "unemployed" these words: "before the date contemplated in the agreement," so that the operative words would run thus, "he shall . . . . be entitled in respect of each day during which he is in fact unemployed *before the date contemplated in the agreement*, during a period of two months from the date of the termination of the service, to receive wages."

On grounds of construction, as well as on broader grounds which have regard to the scope and apparent intent of the statute, it seems to me impossible to construe the section as is proposed on behalf of the defendants. The words suggested by way of "elucidation" would, if inserted, transform the effect of the enactment. The plaintiff, being a man who was in fact unemployed during a period of two months from the date of the "termination of the service"—by reason of wreck or loss of the ship—instead of being entitled prima facie to receive wages in case of unemployment during a period of two months from the date of the loss would be given a prima facie claim to wages for six days.

The broader considerations I have mentioned seem to me also to preclude the suggested limitation. In the present case the loss of the *Croxteth Hall* occurred when she was homeward bound and near the end of her voyage, so that there is reason for the observation that under the terms of the articles the seaman was at the time of the wreck within six or seven days of possible unemployment. But the statute deals by one process of relief with all the infinitely various cases in which a seaman's service may be prematurely terminated by loss of a ship. Given, side by side with this case, a case of some ship outward bound under articles signed for a long voyage, lost at a point so distant that return of the crew to the home port would occupy a period of weeks, reasons at once appear why a standard measure of possible relief based on some period other than that of the unemployment actually suffered under the articles may have been determined upon by the authors of the statute. "Indemnity," the section does not give, either in the broad sense which some of the plaintiff's claims would require, or in the restricted sense which the defendants' construction would give. It gives not "indemnity" but a conditional safeguard. It enables the seaman to claim compensation for loss of wages if he is out of work through shipwreck, but it limits the maximum amount of the possible claim to a period of two months, and it cancels the claim for any part of the two months as to which it is shown that he could have had employment if he would, and was voluntarily unemployed.

The plaintiff's service was, before the date contemplated by his agreement terminated by reason of the wreck of the *Croxteth Hall* on February 28. He was unemployed for two months and upwards from that date and the unemployment was due to the wreck or loss of the ship. He was not able at any time in the two months to obtain suitable employment. Subject to deduction of wages already paid in respect of any of the days subsequent to the wreck he is entitled to recover wages for the two months of his unemployment.

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The steamship *Celtic* was on December 10, 1928, wrecked and lost on the Irish coast near Queenstown in course of a voyage described in the articles under which her crew served as "from Liverpool to New York via Queenstown Boston, and/or if required to any ports within the North and South Atlantic Oceans trading as may be required until the ship returns to a final port of discharge in the United Kingdom." The vessel was homeward bound at the time of being lost, making for Liverpool, which would have been her "final port of discharge" under the articles. But for the wreck Comerford's services under the articles would have terminated on December 11, and he would have been paid off with wages up to and including that date. The crew were brought by tender from the wreck to Liverpool, and on December 13 Comerford was paid off. The wages paid him were wages up to and including December 11. He, together with some of his fellow seamen, received the wages so paid under protest, making this memorandum, "We each claim compensation under section 1 of the Merchant Shipping (International Labour Conventions) Act, 1925."

Comerford had been for some years one of the usual crew of the *Celtic* in her successive voyages to and from the United States in the capacity of a refrigerating greaser and seaman, and if the vessel had not been lost would no doubt have continued to sign articles for further like voyages in the same capacity. His rate of pay was ten guineas per month and, in case of his "working in articles by his vessel in port" without food and lodging found by the ship, he would have been entitled to a money allowance of 4*s*. a day in lieu thereof.

Claims on Comerford's behalf were put forward by his Union on the ground that by reason of the wreck or loss of the *Celtic* his service was terminated before the date contemplated in the articles, and that he was as and from such termination of service unemployed during a period of two months; and further or alternatively on the ground that but for the wreck or loss he would have remained employed on the *Celtic* after her return from the voyage in question. He

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claims also in addition to two months' wages, subsistence money for two months at 4*s*. a day.

For reasons such as I have explained in Murray's case against the steamship *Croxteth Hall* I hold that the statute in question does not give the plaintiff a right to indemnity or damages in respect of disappointed expectations of service other than the actual service provided for in the articles under which he was serving at the loss of the *Celtic*, and that any right he has under the statute for unemployment by reason of the wreck is a right to wages only and cannot be made to include subsistence money.

The defendants adduced evidence to show that employment was available to Comerford on board of various ships which signed on crews between the date of the wreck and the date three months later when he was next employed. As to this matter, however, I do not find the defendants to have established that on any day or days within two months of the wreck Comerford was able to obtain suitable employment.

The main questions in this case, as in Murray's case, are whether Comerford's service was by the wreck or loss of the *Celtic* terminated before the date contemplated in his agreement, and whether he was unemployed during two months from the termination of his service. Upon like grounds to those which I have stated in the case of the *Croxteth Hall*, both these questions must be answered in the affirmative. The fact that, with the *Celtic* safe in port in Liverpool, Comerford's service under his articles would apparently have terminated on December 11, the next day after the loss of the vessel, does not in my judgment deprive him of the benefit conferred by s. 1 of the Act of 1925, and his claim must be allowed for two months from the actual termination of his service by the loss of the ship on December 10, less one day's wages already paid.

Solicitors for the plaintiff Murray: *G. J. Lynskey & Son, Liverpool.*

Solicitor for the plaintiff Comerford: *D. H. Mace, Liverpool.*

Solicitors for the defendants in both actions: *Hill, Dickinson & Co., Liverpool.*

E. C. M. T.

C. A.
1929
Dec. 6.

THE SANDGATE.

Shipping—Charterparty—Lay Days—Despatch Money—" *Working hatch.*"

Under one of the clauses of a charterparty a cargo of coal was to be discharged from the ship, which had four holds, " at the average rate of 125 tons per working hatch per day," and by a marginal note the consignees were not obliged to take cargo from alongside as per the clause in question " at a higher rate than 500 tons per day " :—

Held, that a " working hatch " meant a hatch in which there was still cargo to be discharged, and not a hatch that had contained, or could contain, cargo ; that accordingly the obligation of the consignees was only to take delivery at the rate of 500 tons per day when all four holds contained cargo to be discharged, and that when one or more of the holds was emptied the obligation then was to work the remaining hatches at the average rate of 125 tons per hatch per day.

Appeal from a judgment of the Divisional Court, upholding a decision of the judge of the Mayor's and City of London Court, which raised a question as to the calculation of lay days for the purpose of estimating the despatch money payable under a charterparty on a modification of Form A of the Chamber of Shipping Welsh Coal Charter, 1896.

The appellants (plaintiffs) were the owners of the steamship *Sandgate ;* the respondents (defendants) were Messrs. W. S. Partridge and Co. Under the terms of a charterparty dated April 14, 1926, the respondents chartered the *Sandgate* to carry a cargo of coal from Cardiff to San Rosario. Clause 7 of the charterparty provided as follows :—" The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the vessel, at the average rate of 125 tons per working hatch per day, weather permitting, Sundays and holidays excepted, provided vessel can deliver it at this rate ; if longer detained consignees to pay vessel demurrage at the rate of 30*l*. per running day (or pro rata for part thereof)." A marginal note stated that " consignees shall not be obliged to take cargo from alongside as per clause 7 at a higher rate than 500 tons a day," and, by an added slip : " Steamer to pay despatch money at the rate of 15*l*. per running day or pro rata for part thereof for all working time saved at port of discharge. Lay days in this connection to be calculated on bill of lading quantity without deductions."

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The *Sandgate* loaded a cargo of 4584 tons 12 cwt. in four holds—i.e., No. 1, 727 tons 17 cwt.; No. 2, 1603 tons 19 cwt.; No. 3, 1418 tons 16 cwt.; and No. 4, 834 tons.

The charterers claimed to have saved the ship three days twenty-three hours in the discharge of the cargo, and they therefore deducted from the freight 59*l*. 7*s*. 6*d*. as despatch money. According to the shipowners, only five and a-half hours were saved, and they claimed to recover 55*l*. 18*s*. 9*d*. as despatch money improperly deducted from freight. The judge of the Mayor's and City of London Court found in favour of the charterers and the shipowners appealed.

In dismissing the appeal the Divisional Court (Lord Merrivale P. and Hill J.) said that in their opinion the memorandum or marginal note that the consignees were not to be obliged to take the cargo at a higher rate than 500 tons a day was a provision for the protection of the consignees, and not something which they had undertaken as governing the standard of the rate of discharge. The shipowners had contended that the term "working hatch" was only used in the charterparty to denote cargo hatches as distinguished from other hatches, and that once the number of cargo hatches was ascertained to be four, the rate of discharge became fixed at 500 tons a day. If that were so, it was difficult to understand why the shipowners, who knew their own ship, had not stipulated for a rate of discharge of 500 tons a day instead of, by agreement with the charterers, using the term "125 tons per working hatch," which was not a very common form. The charterers recognized the obligation to take delivery at 500 tons a day while all four holds could be discharged, but they contended that when, working at the rate of 125 tons a hatch, a hold became empty the total discharge was proportionately reduced while the rate per hatch remained the same. In their Lordships' view that contention was sound.

The shipowners appealed.

Clement Davies K.C. and *W. R. Howard* for the appellants. A "working hatch" is a hatch that has contained, or could contain, cargo, and once the number of hatches is ascertained the quantity to be delivered is fixed; four hatches, 500 tons; and, but for the proviso, if there had been five hatches, 625 tons. The obligation is the same throughout the discharge of the whole cargo, whether one of the smaller holds has already been emptied or not, for the word "working" is only used to denote cargo hatches as distinguished from other hatches, such as bunker hatches. If the respondents are right they could discharge the smaller holds first and then take delivery of the two larger holds at the rate of 250 tons per diem. The words of the despatch clause: "Lay days . . . . to be calculated on bill of lading quantity without deduction," shows that the cargo was to be regarded as a whole and not as so much in four separate holds; and, further, it would be extremely difficult for the shipowner to calculate his lay days, for they would depend, according to the respondents, on the amount of cargo loaded in each of the holds.

W. Norman Raeburn K.C. and *G. St. C. Pilcher* for the respondents were not called on.

SCRUTTON L.J. The appellants have to satisfy us that the Court below are wrong in their construction of an ambiguous and mysterious clause. It may be that that puts a considerable burden on the appellants when it is difficult to say what the clause means, but I think I have come to a conclusion on the matter, though whether the parties meant it I do not know. From the freight due by them the charterers have deducted a certain sum for despatch money, nearly four days. The shipowners say that the charterers were not entitled to deduct so much for despatch money— they were only entitled to deduct five and a-half hours. To find out what despatch money is due one must find out what time was allowed for discharging the ship, because despatch money is generally due because the ship is discharged sooner than the time allowed for under the provisions of the charter. The clause as to the time for discharging is this: "The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the vessel, at the average rate of 125 tons per working hatch per day, weather permitting," with a marginal clause: " Consignees shall not be obliged to take cargo from alongside as per clause 7 at a higher rate than 500 tons per day." Mr. Clement Davies, in addressing his captivating argument to us, said that means that the ship is to be despatched at the rate of 500 tons a day. If so, it is a pity that the parties did not use that simple and well-known clause. What they do say is this: " Shall not be obliged to take cargo from alongside . . . . at a higher rate than 500 tons per day," which is not the same as saying that they must take cargo from alongside at the rate of 500 tons a day. Instead of putting it in the simple way that Mr. Clement Davies suggests, they do this: first they do not say it is to be done in so many days—apparently that will not suit them, though that would be a simple way of doing it. They do not say that the cargo is to be discharged at a certain rate per day—that apparently does not suit them. They do not want to say so much each day is to be discharged, and so they put in the word " average," by which more may be discharged one day and less another day, so long as an average rate is obtained. Then, apparently, that still will not do. They do not want to say at an average rate of so much per day. They do say: " At the average rate of 125 tons per working hatch per day," and Mr. Clement Davies argued that there are always the same number of working hatches whether there is coal in them or not. But, if so, there was no need to put in this roundabout phrase of " per working hatch per day " because, the hatches being the same every day, one could, by putting in a rate per day, have calculated on the same number of hatches every day. They put in something different from that. They say: " At the average rate of 125 tons per working hatch per day." That appears to me to assume that there may be a different number of working hatches on one day than on another. If one considers why there may be a different number of working hatches on one day as compared with another, the answer may be that the hatch is not a working hatch if there is no coal in it to work, but the hatch may be a working hatch though there is coal in it and you do not work it. In the original form in which it came into charterparties, the definition of a working day was a day on which ships in the port ordinarily worked, although a particular ship did not work on that day. A working hatch in the same way, it seems to me, is a hatch with coal in it on that day, and the fact that you do not happen to work it on that day does not prevent it being a working hatch which you ought to have worked, and which must be taken into account on the average.

I come to the conclusion, therefore, that this phrase cannot be read as a roundabout way of saying what might have been said quite simply: "I will discharge 500 tons per day out of four cargo hatches, 125 tons for each hatch." What it does mean is to assume that the amount may vary per day, according as there is a working hatch—a hatch which can be worked because there is coal in it. Whether it was a reasonable agreement to make or not, it is not for me to say. The parties have made it in that form, and not in the simple form in which they would have made it if Mr. Clement Davies, construction had been right.

For these reasons I think that the two Courts below came to the correct view of what this phrase means. If shipowners do not like it, the obvious course for them is not to go on putting into the form of charter the additional words "working hatch," but to leave the charter as it was originally —so many tons per day, weather permitting. The appeal must be dismissed with costs.

LAWRENCE L.J. I agree. Mr. Clement Davies has not satisfied me that the decision of the learned judge in the Mayor's and City of London Court, or the decisions of the learned judges in the Divisional Court were wrong, and, in these circumstances, I agree with my Lord.

GREER L.J. I agree with the decision of the learned judge in the Mayor's and City of London Court; I agree with the two judgments that have been delivered in the Court below, and with the two judgments that have been delivered in this Court, and as the sixth judge who has to exercise his mind on this subject, I do not think it necessary to add anything to what the other five judges have said.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Ballantyne, Clifford & Co.*

E. C. M. T.

PRINSEP *v.* PRINSEP.

C. A.
1929
Nov. 1, 4.

Divorce—Ante-nuptial and Post-nuptial Settlements—Variation of Settlements after Divorce—Power of the Court—Extent of Variation permissible—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192.

By an ante-nuptial settlement dated August 7, 1912, trust funds amounting to over 21,000*l.* in value were settled by the husband's mother upon trust to pay the income to the husband for a protected life interest and after his death to pay the income to the wife during widowhood and after her remarriage to pay her half the income during the rest of her life. Subject thereto the trust funds were to be held on the usual trusts in favour of the children of the marriage with a trust in default of any child taking a vested interest for the husband absolutely. By a settlement dated August 25, 1920, the husband's mother settled trust funds amounting to 86,000*l.* in value in trust to apply the income on discretionary trusts for the benefit of the husband and others and subject thereto the trust funds were to be held in trust for, first, any issue of the husband, secondly, the husband's brothers, and, thirdly, the brothers' issue, as the husband should appoint, and in default as the wife, while any issue of the husband were living, should appoint, with a trust in default of appointment for the children of the husband who attained twenty-one years of age or being female married under that age, and if more than one in equal shares. In case no child should take a vested interest the trust funds were to be held on such trusts as the husband should by will appoint and in default in trust for his two brothers' settlements as therein mentioned, and lastly in trust for the last survivor of the husband and his two brothers.

On April 23, 1928, a decree absolute was pronounced dissolving the marriage on the ground of the husband's adultery. There was one daughter born in 1913. The wife petitioned for variation of the two settlements. Hill J. held ([1929] P. 225) that the second settlement was a post-nuptial settlement within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and made an order settling practically all the funds comprised in the first settlement and 24,000*l.* out of the funds comprised in the second settlement on trusts for the benefit of the wife and daughter, and at a subsequent hearing directed that of the balance of 62,000*l.*, 40,000*l.* should be resettled upon trust for the benefit of the husband and any wife and children (other than the child of the first marriage) with an ultimate trust for the husband absolutely, and 22,000*l.* paid to the husband for his own use.

On appeal against the part of the order varying the trusts of the sum of 62,000*l.* :—

Held, (1.) that on the facts the order was not a consent order; and (2.) that the settlements ought not to be varied beyond what was necessary for the benefit of the injured wife and her child, and accordingly that the sum of 62,000*l.* should continue to be held on the trusts of the settlement of 1920, subject only to such variations as were made necessary by the fact that the wife and child had already been provided for.

APPEAL from Hill J.

On April 23, 1928, a decree absolute was pronounced dissolving at her instance the marriage of Marie Kate Wouldes Prinsep, the wife, with Anthony Leyland Prinsep, the husband, on the ground of his adultery. There was issue of the marriage a daughter born on May 26, 1913, the custody of whom was given to the wife. The husband married again in April, 1928.

By an ante-nuptial settlement dated August 7, 1912, trust funds now amounting in value to 21,458*l.* 18*s.* 8*d.* producing an income of 1191*l.* 14*s.* 4*d.* were brought into settlement by the husband's mother upon trust, so far as material, to pay the income to the husband for life or until he should become bankrupt or assign or charge or attempt to assign or charge the income and thereafter during his lifetime on certain discretionary trusts and after his death to pay the income to the wife during widowhood and after her remarriage to pay her a moiety of the said income during the remainder of her life for her separate use and without power of anticipation. Subject to these life interests the trust fund and the income thereof were to be held in trust (in the event which had happened of there being only one child of the marriage) for the child of the marriage at such age or time for such interest and in such manner as the husband and wife should by deed jointly appoint or as the survivor should by deed or will appoint and in default of and subject to any appointment in trust for any the child of the marriage who should attain the age of twenty-one years or being a daughter should attain that age or marry; and if there should be no child who being a male attained the age of twenty-one years or being a female attained that age or married then, subject to the trusts, powers and provisions thereinbefore declared, the trustees were to stand possessed of the trust fund in trust for the husband absolutely. The settlement also contained a covenant by the husband's mother to pay to the trustees of the settlement during the life of the husband an annuity of 1000*l.* and after his death, if the wife or any issue of the marriage should survive him, an annuity of 500*l.* so long as the wife or any such issue should be living on various trusts for the benefit of the wife during the joint lives of the spouses or her widowhood and of the husband, and there were provisions enabling the husband to withdraw from the settlement part of the trust funds and to resettle them for the benefit of an aftertaken wife or her issue.

By a supplemental deed of the same date the husband covenanted to make certain quarterly payments to the wife during their joint lives.

By a deed dated August 25, 1920 (after reciting that the husband's mother had in the year 1917 covenanted to pay the husband an annuity of 2000*l.* and that the husband, now styled the principal beneficiary, had released that annuity as from June 24, 1920), the husband's mother brought into settlement trust funds amounting in value to over 86,000*l.*, and producing an income of 5110*l.*, to be held in trust to apply the income at the discretion of the trustees for the benefit of the husband and his issue by any marriage and any wife of his and in the absence of wife or issue for the benefit of the husband and the persons who if he were dead would be entitled to the trust fund and subject to these discretionary trusts of the income to hold the fund in trust first for any issue of the husband by any marriage, secondly the brothers of the husband, and thirdly the issue of any such brothers as the husband might appoint, and in default of and subject to any such appointment as the wife should appoint while any issue of the husband was in existence, with a final trust for all the children of the husband who attained twenty-one years of age or being females married under that age and if more than one in equal shares. Powers were reserved to the husband to appoint income for her life to any wife of his who might survive him and to the trustees to revoke with the consent of the husband from and after his marriage the trusts declared of the trust fund and to direct the whole or part to be held for the husband absolutely or to declare other trusts and appoint other trustees and also after the husband attained thirty-five but without prejudice to any irrevocable exercise by deed of any other power to declare at their own discretion the cesser of the trusts and to transfer the funds to the husband absolutely and also to raise and pay to the husband for business purposes 20,000*l*. There was an ultimate provision in case no child of the husband should attain a vested interest under the trust in default of appointment for the trust funds to be held upon such trusts as the husband should by will appoint, and in default of appointment in trust in moieties for two settlements in favour of his two brothers Frederick and Nicholas respectively and their respective wives and issue, and lastly in trust for the last survivor of the husband and his two brothers.

By a deed of separation entered into by the husband and wife on February 23, 1926, the wife was to receive an allowance from the husband and his estate of 2000*l*. a year for life, any moneys received by her under the marriage settlement, the deed of covenant and the settlement of 1920 being treated as part payment.

After the decree absolute for dissolution of the marriage had been made, the wife petitioned for variation of the settlements, and the registrar by his report dated November 6, 1929, submitted that the settlement of August 25, 1920, was a post-nuptial settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and proposed terms of variation by which a sum of 20,857*l*. was to be taken out of the first settlement and a sum of 24,471*l.* out of the second settlement and settled upon trusts for the benefit of the wife and daughter not material to be set out. It was further proposed that upon the completion of this new settlement the husband should take the residue of the trust premises absolutely.

The proposed variation was, so far as concerned the husband and the wife, agreed.

A motion to confirm the registrar's report came before Hill J. on November 26, 1928, and February 6 and March 26, 1929, as reported [1929] P. 225.

Hill J. held that the settlement of August 25, 1920, was a post-nuptial settlement which could be varied under the Supreme Court of Judicature (Consolidation) Act, 1925, and approved the proposed resettlement in favour of the wife and child, saying that in arriving at this conclusion he paid no regard to the husband's consent. As regards the balance of the trust funds he (his Lordship) said that in his view the proper course would be to release part only of the balance to Mr. Prinsep and to resettle the rest in such a way as the trustees might approve, so as to carry out the intentions of the original settlement, but upon the basis that the wife and her child no longer had any interest. Some such resettlement upon a second marriage of the husband was contemplated by the settlement of August 25, 1920. Sir Thomas Hughes had intimated that, if the scheme was not accepted as a whole, he had proposals to make on behalf of the husband. He (his Lordship) thought it would be well that the husband and the trustees should see what could be agreed upon, and the matter should be mentioned again.

On July 1, 1929, the matter again came before Hill J., the husband and the trustees having been unable to agree terms, and Hill J. then made an order that a sum of 40,000*l.* should be resettled by vesting the same in the Public Trustee upon trust during the husband's life to apply the income for the maintenance and support of him and any wife and issue of his (other than Jane Prinsep), and after his death then subject to any appointment by him of a life interest to a wife In trust both as to capital and income for the husband's issue by any marriage as he should by deed or will appoint and in default and subject to any such appointment In trust for the husband's children by any marriage (other than Jane Prinsep) who attained twenty-one years or being female married under that age and if more than one in equal shares but if no child of the husband attained a vested interest then in trust for the husband absolutely. He also ordered that the balance of the trust funds should be paid to the husband subject to payment by him of the costs of all parties.

The material part of his judgment is set out in the judgment of Lord Hanworth M.R.

The trustees appealed, but the appeal was limited to that part of the order made on July 1, 1929, no attempt being made to disturb the provisions made for the wife and child.

Gavin Simonds K.C. and the *Hon. Victor Russell* for the appellants. The appellants are trustees of the two settlements of August 7, 1912, and August 25, 1920, and it is with regard to the latter settlement that the present appeal is brought. Under that settlement the trustees have large discretionary powers vested in them which are interfered with by the order appealed against. The trustees are not concerned with the variations of the first settlement of 1912, nor with the provisions made for the benefit of the wife and child.

The first question raised in the Court below was whether the settlement of 1920 was a post-nuptial settlement within the meaning of s. 192 of the Judicature (Consolidation) Act, 1925, so as to give the Court jurisdiction to vary it. That point is not now taken.

The second question, on which the appeal now arises, is whether the discretion given to the judge to vary settlements by s. 192 is rightly exercised if the effect of its exercise is to give the guilty party a benefit to which he or she would not otherwise be entitled.

In the settlement of 1920 the settlor, who was the mother of the husband, in effect stated that she did not wish the capital to be handed over to the husband, and the trustees were given large powers as to dealing with the capital and income. The husband was not to touch the income or corpus of the fund without the consent of the trustees.

It is now proposed to vary the settlement, as appears from the order of July 18, 1929, by handing over a sum of 40,000*l.* to the Public Trustee for resettlement and a sum of 20,000*l.* to the husband absolutely. It is to this last provision that the trustees especially object.

There may be a question whether the necessary parties are before the Court. We have no one here but the husband as respondent.

[LORD HANWORTH M.R. We think that the appeal is properly constituted for presenting the point you wish to put.]

It is submitted that the judge has exercised his discretion on a wrong principle. The discretion given to vary a settlement is ancillary to the power to make a decree for dissolution of marriage. A guilty party cannot come into Court and ask that a settlement shall be varied in his own favour.

Different considerations apply in the cases of innocent and guilty parties, although s. 192 refers to both spouses. The Court does not seek to punish the guilty party. The fact that a bargain was made between the parties is immaterial, and the Court will not consider whether such a bargain has been made.

[RUSSELL L.J. At whose expense is the variation in favour of the husband made ?]

Unborn persons whom the trustees represent.

It is submitted that the variation can only be made at the instance of and for the benefit of the innocent party and that the Court will only vary the settlement so far as is necessary to effect that end. The Court ought to proceed on the principle that a person shall not profit by his own wrong. The question is really one of principle. It is stated in Halsbury's Laws of England, vol. xvi., p. 572, § 1161, that "The Court in varying settlements, without seeking to punish the offender, takes care that as far as possible the finances of the family shall remain in statu quo ante, and that the innocent party and children shall not be adversely affected by the breaking up of the marriage."

There is no reason, however, why the Court should, at the instance of the guilty husband, give him something which the settlor never intended that he should have. *March* v. *March* (1) gives an illustration of the principle upon which the Court acts: see also *Constantinidi* v. *Constantinidi* (2), where Stirling L.J., after referring to Lord Penzance's judgment in *March* v. *March* (1), in which he lays down as a broad principle that the co-respondent is not to be allowed to make any pecuniary profit out of his own iniquity, said that he should prefer to state the law in this way: "that in the exercise of every discretion which is vested in the Court, the Court should endeavour to promote virtue and morality and to discourage vice and immorality."

Sir Thomas Hughes K.C., *Colquhoun Dill* and *C. L. Beddington* for the husband. The order of Hill J. was made on adequate grounds and after careful consideration. It is a proper order made in exercise of a wide discretion and ought not to be disturbed. The terms of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, are extremely wide, and the judge in making an order under it is not exercising a punitive jurisdiction or acting as a judge of morals. The basis of his jurisdiction is that any nuptial settlement contemplates that the husband and wife will continue in that relationship. If then the marriage is dissolved, there is a frustration of the original object of the settlement and it becomes necessary therefore to adjust its terms. It is not for the judge to enforce a code of morals, though he will not wish to encourage immorality: see *Constantinidi* v. *Constantinidi*. (2)

[LORD HANWORTH M.R. The trustees say that the necessary readjustment between the parties has been made by the part of the order providing for the wife and child, and that it is no part of the necessary readjustment to give a different interest to the husband.]

(1) (1867) L. R. 1 P. & M. 440.

(2) [1905] P. 253, 278.

The readjustment for the wife and child was never agreed to as a separate matter apart from the rest of the order.

[LORD HANWORTH M.R. The argument that this is a consent order or a matter of arrangement is really not open on the judgment of Hill J.]

It is true that in his first judgment Hill J. said (1) that apart altogether from consent the variation was a proper one, but all that meant was that he was satisfied that what was proposed for the benefit of the wife and child was sufficient. It does not follow that he would have required so large an amount to be settled on them, if the matter had been argued. So careful a judge cannot have meant that he was dealing with the matter apart from consent, when he had heard no argument on the husband's behalf contending that a smaller sum would suffice to provide for the wife and child. There was an agreement dated February 22, 1928, between the husband and wife that 45,000*l.* should be settled on the wife and child and the balance transferred to the husband.

[RUSSELL L.J. They could not validly agree in regard to property which did not belong to them.]

The registrar found in favour of those terms. Hill J. was uneasy at the proposal that the whole balance over the 45,000*l.* should be paid to the husband, and the husband agreed that part should be resettled.

[LAWRENCE L.J. What is the ground on which the trusts of the existing settlement are disregarded ?]

That the husband assented to the settlement on the wife and child on these terms.

[RUSSELL L.J. Both as to the 40,000*l.* resettled and the balance of 20,000*l.*, the interests of the husband's brothers were disregarded.]

Yes, as being so remote ; but the husband is willing to restore the ultimate gift in favour of the brothers as regards the 40,000*l.* to be resettled. As a resettlement is proposed, it was thought desirable to have a new trustee also. The provision for the wife and daughter cannot stand, if the rest of the order is to be set aside. If the order is to be interfered with, the whole matter should be referred back to Hill J. The releasing of 20,000*l.* to the husband was justified by the decision in *Janion* v. *Janion.* (1)

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(1) [1929] P. 236.

[LAWRENCE L.J. Has that ever been done when the husband was not the settlor ?]

Possibly not. Here the 1920 settlement was not entirely a voluntary settlement by the husband's mother, for he gave up an annuity of 2000*l.* a year in consideration for it. The intention of the settlor in making the settlement is immaterial; moreover, the settlement gave the trustees power to transfer to him the whole trust fund at thirty-five years of age, and he was already thirty-two years old. The Court ought not to interfere with Hill J.'s order made in the exercise of his discretion and after giving the matter full consideration.

No reply was called for.

LORD HANWORTH M.R. This is an appeal from a judgment of Hill J. on July 1 of this year in part confirming and in part varying the report which had been made by the registrar under s. 192 of the Judicature Act, 1925, in regard to varying certain settlements which had been made on the occasion of the marriage, and subsequently, of these spouses who had been divorced.

The facts, so far as it is necessary to refer to them in the present judgment, are these: the marriage took place between the two spouses on August 8, 1912. Antecedently to that an ante-nuptial settlement had been executed. The marriage took place, and there was one child, a daughter, who was born on May 26, 1913. On August 25, 1920, a post-nuptial settlement was made. On August 14, 1927, the decree nisi was made, and on April 23, 1928, that decree was made absolute, and the marriage therefore between these two spouses was dissolved.

In accordance with s. 192 an application was made to deal with the settled property, for the mother of the husband was a lady of large means, and she had made the settlement of August 7, 1912. The wife did not bring any money at all into the settlement. At that time Mrs. Ball-Greene, the mother of the husband, brought in a sum of 21,000*l.* to the settlement fund, and she provided a protected life interest to her son, and thereafter discretionary trusts. That settlement followed a comparatively common form, but there was also contained in it a covenant on the part of Mrs. Ball-Greene to pay 1000*l.* a year to the trustees for the benefit of the husband, and after his death to pay a sum of 500*l.* a year to the wife and the issue of the marriage.

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(1) Unreported, but noted [1929] P. 237.

The settlement of August 25, 1920, dealt with much larger funds; the total sum that was dealt with under that settlement was over 80,000*l.* Again, I need not refer in detail to its terms, which are set out in the report of the case (1), except to say that it was a post-nuptial settlement made in favour of the husband and contained provisions under which he took, as what was called the principal beneficiary, protected interests. But there was a power on the part of the trustees if they should so determine after the principal beneficiary had reached the age of thirty-five years to hand over the funds to him. If they did not do that there were interests created in favour of the wife and the issue. Finally, there was an interest, if there should be no appointment made by the principal beneficiary, for the brothers of the principal beneficiary—other sons of Mrs. Ball-Greene.

When the marriage was dissolved in this case, the wife having brought no money into settlement and the husband being very amply provided for, it was not unnatural that the application should be made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, which provides: "The Court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this sub-section notwithstanding that there are no children of the marriage."

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(1) [1929] P. 225.

I agree with Sir Thomas Hughes that, broadly speaking, the purpose of that section is to readjust the settlements as between the parties in order that on the dissolution of the marriage provision may be made for the innocent party, and indeed that the relations inter se of the spouses may be reorganized as the Court may think right.

In the present case upon that application being made the matter went in due course before the registrar. The registrar's report is set out in the report of the case in the Law Reports. (1) Shortly put, it is that a new settlement should be created giving the wife a life annuity of 2000*l.* and the child one of 500*l.* during the joint lives of the wife and child and after the death of the wife giving the child an annuity of 1000*l.* for life and subject thereto on trust for the husband and child, her husband and children with an ultimate trust for the husband, the husband covenanting to make up any deficiency of income to meet the annuity of 500*l.*, and after the death of the husband and the wife to make up for the child a provision of 2500*l.* per annum, and that after the completion of this new settlement the husband should take the residue of the trust premises absolutely free from the original trusts with all consequential directions as to the settlements and the costs. I have pointed out that both in the original settlement and in the post-nuptial settlement there was a protected life interest given to the husband. But, more than that the second settlement of 1920 was obviously conceived in the spirit of protecting the husband from himself and it contained various clauses giving a wide discretion to the named trustees. It will be observed that the report of the registrar provides for a new settlement and that the husband should take the residue of the trust premises after provision had been made for his late wife and child absolutely free from the original trusts of the settlement. That was brought before the learned judge and he varied the

(1) [1929] P. 227, 228.

order and directed that instead of the whole of the residue of the trust funds being handed over to the husband there should be a resettlement of 40,000*l*. and the balance of some 22,000*l*. only should be handed over to the husband absolutely.

Hill J. took the view that the wise and proper course would be to release part only of the balance of 62,000*l*. or 63,000*l*. and to resettle the rest in such a way as the trustees might approve so as to carry out the intentions of the original settlement, but upon the basis that the petitioner and her child have no longer any interest therein; and he says in his judgment that there should be new trustees—that is to say that the Public Trustee should be appointed. Then he says: "The only question as to which I think there is any difficulty is as to whether in the new settlement we should carry out the suggestion of para. 4 (*c*) of the suggested heads of settlement that 'If any child of Mr. Prinsep does not live to attain a vested interest then in trust for Mr. Prinsep absolutely' or whether we should endeavour to embody again the provisions as to the possible interests of the brothers or the trustees of the brothers. I said on the previous occasion that I thought their interest was so very remote that it ought not to affect the way in which I dealt with the fund in the interest of the petitioner and her child and really I think the same applies to the present proposals; it is so remote and I think it will only complicate the matter and it would be much better to have it on the simpler trusts which are suggested."

I do not say that under no circumstances could the course indicated by Hill J. with regard to the interests in favour of the brother be adopted; but Hill J. has, I think, himself stated the true principle on which s. 192 is to be used, that is, that prima facie settlements ought not to be interfered with further than is necessary for the purpose of making proper provision for the injured spouse and the children of the marriage. Accepting that view of the purpose of the statute, I feel difficulty in seeing how it can be right to adopt, as Hill J. has done, the course of resettling 40,000*l*. out of the balance of 63,000*l*. on trusts which are

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quite different from those which were contained in the 1920 settlement, and of releasing the principal beneficiary from the terms of those trusts as to the remaining part of this balance by handing it over to the principal beneficiary absolutely free from the terms of the original trusts upon which it is settled. If one is to interfere no more than is necessary for the purpose of the interest to be taken by the late wife and daughter, it seems impossible to accept the view that this further provision should be made under which the husband is to be freed from what may be called the discretionary trusts—possibly happier words would be the fetters of the settlement of 1920.

It has been argued before us that the matter was a matter of agreement. But I do not so read Hill J.'s judgment. I have looked at his notebook, and I think it is plain that on the last occasion when the matter was before him certain proposals were made with regard to the figures. It is true he records that the Public Trustee was agreed upon, but it is also clear from his note that Mr. Farwell, who then led Mr. Russell on behalf of the trustees, protested against the interference with the existing settlement, and Hill J. said: "Quite apart from any question of agreement I say 40,000*l.* ought to be resettled and the balance to be paid over to Mr. Prinsep." That is his determination. I have indicated that so to deal with the 60,000*l.* is, in my view, to go far further than is necessary for the purpose of making provision for the late wife and the daughter. It was argued before him that with regard to the interests of the brothers they could only come in at all if (1.) there were no children who attained the age of twenty-one, or being daughters, married; and (2.) the husband did not exercise his general power of appointment. It is true that the interests of the brothers were remote, but the interests existed and the discretion of the original trustees existed, and we have to determine whether or not it is open to a judge, quite apart from the necessary intervention in the settlements which is required to make provision for the spouse and the daughter, to free himself from the terms of the settlement and to make such provisions

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as he thinks proper in the general circumstances of the case. It appears to me that there is no authority under s. 192 to go so far. Hill J. has definitely said that so far as provision is made for the late wife and the daughter in the registrar's report it is a proper variation, and he has said that in considering and coming to that conclusion he pays no regard to the consent of Mr. Prinsep. I do not think that the consent of the parties in any way binds or fetters the Court. Hill J. felt that, and he made the order on his own motion and under the powers the statute gives him; but in my judgment he has gone beyond those powers, for he has neglected to follow his own rule that settlements ought not to be interfered with further than is necessary for the purpose then before the Court of making provisions for the benefit of the children or of the parties to the marriage.

For these reasons it appears to me that the order of Hill J. cannot be upheld, and that the right order will be that the provision made for the late wife and the daughter is to stand, and that with regard to the balance of the trust funds—that is the 63,000*l.*—the settlement of 1920 must be affirmed, but with such necessary variations as the creation of the interests in favour of the late wife and daughter require. The appeal therefore will be allowed.

LAWRENCE L.J. I agree. In his first judgment delivered on March 26, 1929, Hill J. has correctly stated the principle on which the Court ought to act in making orders to vary settlements under s. 192 of the Act of 1925—namely, that prima facie settlements ought not to be interfered with further than is necessary for the purpose of making proper provision for the injured spouse and children. In making his final order on July 1, 1929, however, the learned judge has in my opinion drastically departed from that principle.

The short effect of that order was to provide for the injured spouse and the child of the marriage by taking out of the 1912 settlement the bulk of the trust funds comprised therein, and further by taking out of the 1920 settlement trust funds to the value of nearly 25,000*l.* No question arises as to the

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propriety of that variation and, if the matter had stopped there, there would have been no cause to complain. But the order then went on to direct that the whole of the remaining trust funds should be taken out of the trusts of the settlements. With regard to the balance of the trust funds under the 1912 settlement, I think the learned judge rightly exercised his discretion in ordering that to be paid out to the husband. He was the ultimate beneficiary under that settlement, and the other beneficiaries had been adequately provided for by the fresh settlement directed to be made in favour of the injured spouse and her child. As regards the balance of the trust funds under the 1920 settlement, however, I think that there was in the circumstances no justification for dealing with it in the manner directed by the learned judge. The fund remaining under that settlement amounted to about 62,000*l.*, and the learned judge dealt with that fund by directing part of it (namely, a sum of not less than 40,000*l.*) to be settled on trusts substantially different from the trusts of the 1920 settlement, and the rest of it (amounting to upwards of 20,000*l.*) to be paid out to the husband.

Now the only reason that I can discover from the learned judge's judgment for adopting that course was that under the trusts of the 1920 settlement there was in clause 8 a power to the trustees notwithstanding any of the trusts thereby declared to pay to the husband at his request any sum not exceeding in the whole 20,000*l.* The learned judge seems to have considered that in those circumstances it would not be unfair to order a sum of approximately 20,000*l.* to be paid to the husband free from the trusts of the settlement. As regards the 40,000*l.* the learned judge seems to have considered that the power conferred by the settlement on the trustees to make a new settlement on the husband in the case of a subsequent marriage justified an order directing a new settlement to be executed, as the husband had married again.

In my opinion neither of those reasons affords a sufficient justification for disturbing the trusts of the 1920 settlement more than is necessary for the purpose of making a provision for the injured spouse and her child. On principle there is no reason why, on varying a settlement under s. 192, any further variation should be made than such a variation as necessarily or reasonably flows from the provision which is being made for the wife and child. In the circumstances of the present case, and having regard to the principle I have stated, I am of opinion that the only variations which ought to be made as regards the funds remaining subject to the trusts of the 1920 settlement are variations which would have the effect of extinguishing the beneficial interests therein of the wife and the child. As regards the wife she has an interest in the income of the trust fund under clause 3 of the settlement, and she also has a power under clause 4 in default of appointment by the husband to appoint the capital and the income of the fund as thereby provided. As regards both those interests I am of opinion that it follows from the provision made for her by the fresh settlement that they ought to be extinguished as if she were dead. As regards the child, she is a beneficiary under the discretionary power conferred by clause 3 as to the income, and under clause 4 she is interested in the capital of the fund both as an object of the special powers of appointment and in default of appointment. Now as regards the child's interest in the income, I think that should be extinguished. As regards her interest in the capital, I think that her interest in default of appointment should be extinguished, but not her interest as an object of the special powers of appointment. It may well happen that her father will have no issue by his present or by any future marriage, and that he may for that or for any other reason desire to appoint to his existing child notwithstanding what has happened.

There is only one other matter which in my opinion follows upon the order which has been made for the provision of the wife and child—namely, that the estate of Mrs. Ball-Greene ought to be released from the covenant as to the 1000*l.* a year and the 500*l.* a year contained in the settlement of 1912. Subject to the variations I have indicated the proper course is to leave the 1920 settlement undisturbed as regards the balance of the trust funds. In the result I have come to the conclusion that the learned judge was wrong in principle in putting an entire end to the 1920 settlement, and thus displacing it to a far greater extent than was necessary for the purpose of exercising the powers contained in s. 192. I therefore agree that the appeal should be allowed.

RUSSELL L.J. I am of the same opinion. The learned judge by his order, so far as his order was made on March 26, directed that there should be transferred to new trustees first of all substantially the whole of the 1912 settlement funds and also in addition to that a sum of 24,000*l*. or 25,000*l*. out of the 1920 settlement funds, and he directed a settlement of those funds in the hands of the new trustees upon trusts which I need not state in detail; but they were for the benefit of the wife and child of the first marriage with an ultimate trust in the event of the child not taking, for Mr. Prinsep. That was considered by the judge to be the proper provision to be made for the benefit of the first wife and the daughter, Jane Prinsep. He made that provision quite independently of any consent by Mr. Prinsep, and as I read his judgment he would have made it in the teeth of opposition by Mr. Prinsep. I can attribute no other meaning to the language which he has used in his judgment, where he says (1): "So far as the report and the scheme relate to Mrs. Prinsep and the child, I have no doubt that it should be approved in all its details. In arriving at that conclusion I pay no regard to the consent of Mr. Prinsep. Apart altogether from consent, it is a proper variation, so far as Mr. Prinsep, Mrs. Prinsep and the child are concerned." Now, that was a perfectly proper order to make, in my opinion, and if that had been the whole of the order, provision would no doubt then have been made for extinguishing the interests of the child and the first wife under the two settlements. But in view of the order which was in fact made, there was no necessity for that provision, because the order in fact provided for the handing over of the balance of all the funds to Mr. Prinsep. Now, that part of the order which he made on July 1 was this: having taken a portion of the funds of the 1920 settlement for the purpose of making provision for the first wife and the child, the learned judge then proceeded to take a further 40,000*l.* out of that settlement and to direct it to be transferred to the Public Trustee to be held upon certain trusts indicated, and as to the balance which amounted in round figures to some 22,000*l.* he directed that that should be paid out and out to Mr. Prinsep.

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(1) [1929] P. 236.

Let me indicate in a few words what the effect of that order is. That part of the order confers no benefit upon the first wife or the child. It operates solely for the benefit of Mr. Prinsep and it operates for his benefit at the expense of third parties. It operates to cut out altogether the interests of the Frederick Settlement beneficiaries and those of the Nicholas Settlement beneficiaries under clause 3 (1.) of the 1920 settlement. It cuts out their interests as objects of the discretionary trusts of income, and that cutting out applies both as to the 40,000*l.* and as to the balance of 22,000*l.* It applies to the whole 62,000*l.* Such a proceeding is no doubt justifiable for the purpose of providing means of support for the first wife and child, but in my opinion, it is quite unjustifiable except for that purpose.

Secondly, that order operates to cut out altogether the interests of the same people under the ultimate trusts under clause 9. That, again, applies both as to the 40,000*l.* and as to the balance of 22,000*l.*

Thirdly, it operates to cut out the interests of all Mr. Prinsep's unborn children and issue in regard to the balance of 22,000*l.* handed over to him.

There is no necessity for making any such order. There can be no doubt that if the balance of 62,000*l.* is allowed to remain subject to the trusts of the 1920 settlement, there is ample provision for the maintenance and support both of Mr. Prinsep himself and of any future wife or children of his. That large sum remains under the trusts of the 1920 settlement available for their support and maintenance.

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The learned judge in his judgment having stated perfectly correctly, in my opinion, the principle on which the Court proceeds, and ought to proceed, in these cases, himself without justification entirely departs from it. The principle as he states it is as follows: "Prima facie settlements ought not to be interfered with further than is necessary for that purpose," that purpose being to make proper provision for the injured spouse and the children of the marriage. It seems to me that if the learned judge had acted strictly in accordance with that principle, he ought, having made proper provision for the injured spouse and the child out of the funds of the first settlement and out of a portion of the funds of the 1920 settlement, to have left undisturbed in the possession of the trustees of the 1920 settlement the whole balance then remaining of the 1920 settlement funds, only making such alterations in the trusts as were rendered necessary by the fact that the wife and daughter were provided for; and that is the order which I think this Court ought to make.

Appeal allowed.

Solicitors: *Radcliffes & Hood, St. Barbe Sladen & Wing; Theodore Goddard & Co.*

H. C. G.

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Oct. 18, 22, 30;
Nov. 5.

Explained. STRINGER *v.* STRINGER [1952] P. 171

Husband and Wife—Marriage in England in English Form—Disability of Husband by Law of Domicil to marry in English Form—Foreign Decree of Nullity and Order for Payment of Lump Sum of Money by Husband to Wife—Consent of Parties—Illegal Agreement—Decree not severable—Incompetence of Foreign Court—Orders for Maintenance by High Court and Courts of Summary Jurisdiction distinguished—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 5 (*c*)*—Evidence Act,* 1851 (14 *&* 15 *Vict. c.* 99), *s.* 7*—Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 187, *sub-s.* 1; 190, *sub-ss.* 1, 2, 4*—Ordinance and Orders in Council, Cyprus, January,* 1879, *s.* 71; *November,* 1882, *ss.* 4, 5, 22; *February,* 1883, *s.* 2.

The disability of a foreigner to marry in England otherwise than in accordance with the law of his country as regards matters of form is a disability of which he can divest himself at will and therefore constitutes no objection to the validity of a marriage contracted by him in England in English form. A decree of a foreign Court invalidating such a marriage is recognizable in England only if the foreign Court has jurisdiction over the marriage and even then is open to examination.

Want of jurisdiction cannot be cured by mere consent of the parties. A decree of a foreign Court purporting to annul an English marriage under these circumstances is not severable, and if it is incompetent to annul the marriage, neither is it competent to award maintenance or a lump sum in lieu of maintenance.

The husband, a domiciled Cypriot, married a Frenchwoman in England in English form. Afterwards he repudiated the marriage on the ground that it was not in form in accordance with the law of his domicil. Later, on proceedings by the wife in a Cypriot Court the marriage was declared null on the same ground by consent of the parties, and it was further declared that the husband should pay the wife a lump sum in satisfaction of all claims, including maintenance. The Cypriot Court by the terms of its constitution had no jurisdiction to annul a marriage. (1) Still later, the wife, finding the husband in England, took out a summons against him for neglect to maintain her under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. The summary jurisdiction court, upholding the marriage, ordered the husband to pay maintenance:—

Held, that the marriage was good and the agreement to set it aside illegal, that the decree of the Court in Cyprus was pronounced without jurisdiction in compromising maintenance as well as in annulling the marriage, and that the order of the court of summary jurisdiction must stand, the measure of maintenance within the limits of the Summary Jurisdiction Act being the means of the parties at the time of the proceedings.

APPEAL from a court of summary jurisdiction.

The appellant Stylianos George Papadopoulos appealed

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(1) See Ordinance and Orders in Council, post, p. 71.

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from the order of a metropolitan police magistrate (1) made on a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, that he should pay to the respondent Annie Eugenie Louie Papadopoulos the sum of forty shillings per week as maintenance and her costs of the summons. The question raised was whether a valid marriage subsisted between the parties to confer jurisdiction on the Court.

The appellant was born in Cyprus in 1886, and in 1905 came to London to study medicine. At this stage he formed an acquaintance with the respondent, who was of French nationality, and for nearly six years lived with her as man with wife until November 27, 1912, on which date he went through a ceremony of marriage with her at a register office in London according to English law. Having qualified as a medical practitioner he returned to Cyprus—according to his case in 1913—according to the case of the respondent in 1914. She followed him to Cyprus and took proceedings against him there in the District Court of Nicosia (*a*) for a declaration of the validity of the marriage; (*b*) for maintenance, or alternatively and in the event of the invalidity of the marriage (*c*) damages for breach of promise of marriage and further in respect of money claims for services rendered and money lent and for costs.

The result of these proceedings was, so far as is material, an order by consent dated May 19, 1914, declaring the marriage void, as contrary to the law of the domicil, that the respondent should make no further claim against the appellant in respect of the "subject" of the proceedings or use his name, and that the appellant should pay 380*l*. in full satisfaction of all claims.

In 1914 the appellant returned to this country for the purpose of practising medicine here and had since remained here with the exception of short visits to Cyprus, but it was not denied that he retained his Cypriot domicil of origin. He had not been naturalized in England and claimed to be a Cypriot British subject. It was common ground that the marriage was invalid according to the law of the Cypriot domicil of the appellant, which from the date of the celebration and at the date of the proceedings in the District Court of Nicosia was also the domicil of the respondent, by reason of the fact that the marriage was not celebrated in a church or by a priest of the Greek Orthodox Church, which by the law of the domicil were necessary conditions for the marriages of Greek Orthodox Christians, that being the status of the appellant.

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(1) Mr. R. F. Graham-Campbell sitting at Bow Street. The decision is reported in Justice of the Peace, vol. 93, p. 434.

In May, 1919, the appellant married another woman in Cyprus according to the only local form, that of the Orthodox Church. In 1929 the respondent followed the appellant to England and took proceedings against him, which resulted in the order now appealed from, the court of summary jurisdiction deciding that the judgment of the Court at Nicosia rested not on any question of form but on domicil, and that its own jurisdiction (that of the court of summary jurisdiction) was not dependent on domicil but on local failure to maintain, provided that no question arose as to form, and that the judgment of a foreign Court was incompetent to impugn the validity of an English marriage on the ground of absence of form required by the law of the domicil.

Expert evidence had been tendered to the court of summary jurisdiction on behalf of the appellant to the effect that the Court in Cyprus would regard domicil only on the question of validity of marriage.

Schiller K.C. (*Martin O'Connor* with him) for the appellant. The magistrate was wrong in holding that he had jurisdiction to make any order, the marriage having been declared null and void in the Court of the domicil, and wrong in holding that the woman was not estopped from alleging that she was a wife.

The effect of the order by consent that the appellant should pay 380*l.* in satisfaction of all claims of the respondent is that she has compounded them, whether for maintenance

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or for damages for breach of promise to marry. She has taken the money in discharge whatever her status, wife or not. The matter was res judicata when the respondent went before the magistrate.

[LORD MERRIVALE P. The question is one of jurisdiction. Nullity of marriage is not merely a matter inter partes. The public are interested.]

The respondent is in this dilemma. Either this is a judgment in rem and the marriage is a nullity, in which case the parties of it are competent to agree on money claims and there is an executed agreement, or if the marriage holds good they are spouses and may agree as to maintenance.

[LORD MERRIVALE P. referred to *Jenkins* v. *Robertson* (1) and Halsbury, Laws of England, vol. xiii., tit. Estoppel, p. 342, on the question of the force of the Cyprus decree which proceeded on consent.]

A judgment by consent is as effective as an estoppel inter partes as a judgment after a contest: per Lord Herschell L.C. in *In re South American & Mexican Co. Ex parte Bank of England.* (2) A similar result arises in this Court from a decree as to the validity of a marriage although there has been no contest: *Woodland* v. *Woodland otherwise Belin.* (3) The decree in the present case is under the seal of a foreign Court. It is a judgment in rem, and one which the English Courts are "bound to receive without enquiry as to its conformity or nonconformity with the laws of the country where it was pronounced": per Lindley M.R. in *Pemberton* v. *Hughes* (4) citing Lord Cranworth in *Doglioni* v. *Crispin* (5), and the learned judge points out that it is impossible to hold that a foreign decree in a matrimonial suit pronounced in an undefended case will never be recognized here. (6)

[LORD MERRIVALE P. Those are not decisions on status. This case turns on domicil.]

They show that this Court must not presume irregularity in the foreign Court: per Bray J. in *Clydesdale Bank, Ld.* v.

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(1) (1867) L. R. 1 H. L. Sc. 117, 121.
(2) [1895] 1 Ch. 37, 50.
(3) [1928] P. 169.
(4) [1899] 1 Ch. 781, 793.
(5) (1866) L. R. 1 H. L. 301, 315.
6) [1899] 1 Ch. 794.

Schröder & Co. (1) This case is one of nullity and not of dissolution of marriage and does not depend on domicil: *Armytage* v. *Armytage*. (2) *Ogden* v. *Ogden* (3) may be cited against me. That case is commented on and even doubted in *Salvesen* v. *Administrator of Austrian Property*. (4) See also Dicey on Conflict of Laws, 2nd ed., p. 838 [4th ed., p. 877].

A foreign decree, if final and conclusive between the same parties in the foreign Court, is conclusive here: *Ricardo* v. *Garcias*. (5) There is no material for impugning the judgment of the Court in Cyprus, and the judgment is a valid one inter partes. The second part of the judgment of the Court of Appeal in *Ogden* v. *Ogden* (3) is material. The principle is that residence gives jurisdiction in nullity, and as the Court in Cyprus was competent in that respect this Court is bound to enforce its judgment: *Schibsby* v. *Westenholz*. (6)

The real question here is not the validity of the marriage but the competence of the jurisdiction to decide money claims whether the marriage is valid or not. The burden to negative jurisdiction is on the respondent. The appellant is in the same position as if an English inferior court, e.g., the Court of Passage, had dealt with the amount of a claim which originated in status, a matter which it was not competent to decide. It is no part of the appellant's case here to dispute the validity of the English marriage, and the Court of the man's domicil was competent to deal with money claims as between husband and wife, and equally if there were no marriage the Court of the domicil was competent to decide the money claims. On either footing the Cyprus judgment is conclusive of these claims. The judgment is severable, and that part of it which purports to annul the marriage is irrelevant to the subject-matter of this appeal.

[LORD MERRIVALE P. What is the effect of a lump sum being ordered in Cyprus? Did it deprive the court below of jurisdiction? Was it an estoppel, or merely an adjustment?]

The effect of *Hyman* v. *Hyman* (7) is consistent with the jurisdiction of the court below being ousted by what had taken place in Cyprus. The House of Lords has in that case reserved the question of the binding effect of agreements in matrimonial suits other than those of dissolution.

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(1) [1913] 2 K. B. 1, 5.
(2) [1898] P. 178.
(3) [1908] P. 46.
(4) [1927] A. C. 641.
(5) (1845) 12 Cl. & F. 368, 401.
(6) (1870) L. R. 6 Q. B. 155, 159.
(7) [1929] A. C. 601.

The function of the court of summary jurisdiction is merely to make separation orders, as opposed to decrees of dissolution.

Bayford K.C. (*Julian Fuller* with him) for the respondent. The judgment is not severable. It is binding as a whole, but, if severable, it certainly binds as to financial liability. The basis of the discussion is "Wife or not wife."

An agreement to set aside a marriage, which is suggested to have been the essence of what took place before the Cypriot Court, is not an agreement that it is competent for the parties to make. When the status of husband and wife has been once acquired the public are interested, and the status cannot be got rid of except by proceedings before a competent Court: *Salvesen* v. *Administrator of Austrian Property.* (1) Although our Courts do not generally inquire whether a foreign Court has exercised its jurisdiction improperly, an exception arises if substantial injustice has been committed. As it is said in the same case in which the foreign judgment was upheld, there must be a genuine action and no collusion. In this case there was collusion, and on the face of it an agreement to have the marriage set aside. The governing law was the lex loci celebrationis not that of Cyprus, and the Cypriot Court does not appear to have proceeded on any evidence of what the lex loci celebrationis was. In *Berthiaume* v. *Dastous* (2) it is said: "If there is one question better settled than any other in international law it is that as regards marriage . . . . locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses."

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(1) [1927] A. C. 641, 653.

(2) [1930] A. C. 79, 83; 45 Times L. R. 607.

The basic difference between the appellant and the respondent is that his case is that validity of marriage is only incidental and hers that it is vital to the contest. The judgment of the Cypriot Court offends against the cardinal principle of international law that the lex loci celebrationis governs questions of form, and that judgment is accordingly bad, and, as it is inseverable, bad in its entirety and because it is inseverable the order appealed from was right. Even if the agreement between the parties was good so far as regards quantum, as contended, the principle of *Hyman* v. *Hyman* (1) applies, and it did not bind the Court below. The husband cannot rid himself of his liability to third parties. It is not a question of the form of relief, whether by way of dissolution or any other remedy. In the same case Lord Shaw was of opinion that the case of *Gandy* v. *Gandy* (2) was wrongly decided. *Hyman* v. *Hyman* (1) cannot be said to support the appellant's suggestion that it was consistent with the jurisdiction of the Court below being ousted by the agreement.

[LORD MERRIVALE P. referred to the Cyprus Ordinance and Orders in Council set out in the note, post, p. 71.

Cur. adv. vult.

NOV. 5. THE PRESIDENT (LORD MERRIVALE). The main questions in this appeal are whether the appellant is entitled to repudiate and has effectually repudiated a contract of marriage into which he entered in London in 1912, and whether the respondent is bound by an agreement with the appellant into which she entered in 1914 whereby it was agreed, in consideration of a sum of money paid by the appellant to the respondent, that the marriage so contracted was or should be treated as a nullity. Incidental questions have arisen with regard to the laws of Cyprus before and since 1914, when the island became incorporated in the British Empire, the nature and extent of the jurisdiction of the British Courts which existed in Cyprus during the Protectorate and before the annexation, the marriage laws or customs of

(1) [1929] A. C. 601. (2) (1882) 7 P. D. 168.

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Cyprus as they affect native members of the Greek Church there and here, and the juristic and evidential effects of a consent judgment recorded in the Courts in Cyprus.

The appellant, a Cypriot, born in the island in 1886 of Greek parents domiciled there, became a medical student in London in 1905 and resided here continuously until 1913, and since December, 1914, has again been resident here. In London about 1906 he made the acquaintance of the respondent, who is of French origin and apparently of French domicil, and after living together for some years they were, in 1912, married before the Registrar of Marriages of the Holborn District.

The marriage at the Holborn Registry is that which the appellant repudiates. The ground of repudiation is an assertion that he was at the time a member of the Greek Church and that the marriage of members of the Greek Church in Cyprus could only be effectually solemnized in a church in the presence of a priest. It is unnecessary to consider what proof would establish such a contention in an English Court. In Cyprus it appears to have been believed. The matter did not arise before the learned magistrate and it was not raised here.

The appellant, after obtaining his diplomas, went back to Cyprus, leaving the respondent here with authority, it was said, to provide for her maintenance by selling their household furniture. She later followed him to Cyprus and, not being received by the appellant as his wife, she instituted a suit in the District Court of Nicosia, one of the British Courts in Cyprus established by and regulated under Orders in Council pursuant to the powers of the Crown under the Anglo-Turkish Convention of 1878, whereby she asserted her marriage with the appellant and claimed maintenance and, alternatively, damages for breach of promise and other pecuniary relief. When the suit came on for hearing terms were agreed upon and made the basis of a consent judgment, whereby it was ordered (inter alia): "That plaintiff and defendant declaring that the marriage celebrated on the 27th November, 1912, at the Holborn Registration District in the County of London between the parties, being void ab initio as contrary to the law of the domicil of both parties as regards the essential conditions of marriage, it is hereby declared null and void; that the plaintiff shall not make any further claim against the defendant whensoever or wheresoever in respect of the matters which form the subject of this action or otherwise; that the plaintiff shall not use the name of Styliano G. Papadopoulos or any part thereof; that the sum of 380*l.* be paid by the defendant to the King's Advocate at his office within a week from to-day for the account of the plaintiff in full satisfaction of all claims of the plaintiff against the defendant." The King's Advocate was one of the counsel for the plaintiff in the action. The respondent received the sum named in the decree made in Nicosia and left Cyprus. She and the appellant saw no more of each other for the ensuing fifteen years. He, it is said, married again in Cyprus.

In the present year, however, the respondent took up her residence again in London, and after some communications between the solicitors of the parties she obtained the issue of a summons at the Bow Street Police Court claiming an order for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground of the respondent's "wilful neglect to provide reasonable maintenance" for her. In a carefully considered judgment the learned magistrate, Mr. Graham-Campbell, found the respondent's allegation proved and ordered maintenance at the rate of 2*l.* per week. This is the decision against which the present appeal is brought.

The notice of appeal puts forward the judgment in the District Court at Nicosia as a bar to all further proceedings of the respondent, and the payment and acceptance of the sum of 380*l.* as a final satisfaction of all possible claims of hers antecedent or subsequent thereto. The judgment is set up as res judicata to establish the nullity of the marriage contract made in London; that is as a judgment in rem granted in a competent Court of the domicil of the appellant invoked by the respondent; binding, prima facie, against all the world but, at any rate, not open to any attack by the party who obtained it.

On the hearing of the appeal the broad questions which I have specified were argued on behalf of the appellant. It was not part of his case that the marriage in London was not valid. It could not well be. The suggested disability of a member of the Greek Church in Cyprus to marry otherwise than in accordance with the rules of that Church was what Sir Gorell Barnes designated in *Chetti* v. *Chetti* (1) a disability which can be got rid of at will and, therefore, was no bar to this marriage. Counsel relied upon the provisions of the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7 of which permits proof of foreign and colonial judgments by production of copies authenticated in compliance with the statute. Producing a document so authenticated he claimed that this Court, whatever its view as to the apparent sufficiency of the transaction in Cyprus, should accept the decree as conclusive of the rights of the parties in the matters to which it referred. Moreover, he submitted, the decree itself afforded evidence of the jurisdiction of the Court. The Court at Nicosia, he said, must be assumed to have acted within the jurisdiction it in fact had. Inasmuch as there was not before the learned magistrate, or here when the hearing began, any express evidence that the Court at Nicosia had not such jurisdiction, any lawful assumption, he contended, ought to be made in support of the validity of the decree. It might be, he suggested, that the Court had regard to Ottoman law or customs of the Greek Church, known and recognized in Cyprus and familiar to the judges.

As to the general contentions concerning the validity of foreign judgments the argument goes a good deal beyond the law. The judgment of the House of Lords in *Ricardo* v. *Garcias* (2) was relied upon, and no doubt sets forth clearly the rule which is to be observed. The question on which the House of Lords there pronounced judgment arose on pleadings in the Court of Chancery. Upon the allegations made in the answer of the defendants in the suit the House

(1) [1909] P. 67, 78.

(2) 12 Cl. & F. 368, 401.

held that certain judgments of French tribunals were—upon the pleadings—so alleged as to constitute in law a good plea of res judicata and in equity an effectual answer and defence. The allegations so set up were allegations showing as matter of fact and matter of law a resort of the plaintiff in the suit to a competent Court in France, a hearing of his case there, a judgment pronounced which the Court was competent to pronounce, afterwards appealed against and affirmed on such appeal. The narrow principle of law on which their Lordships proceeded was stated by Lord Lyndhurst and very concisely by Lord Campbell. The concise statement of Lord Campbell suffices for the purposes of this case. It was that "a foreign judgment might be pleaded as res judicata because the foreign tribunal has jurisdiction over the matter, and both parties having been regularly brought before the foreign tribunal and that tribunal having adjudged between them, such a judgment would be a bar to a subsequent suit in this country for the same cause."

Whether the Court at Nicosia had jurisdiction to hear and determine a suit for nullity of marriage is a question of fact as to the law of Cyprus. In *Ricardo* v. *Garcias* (1) the relevant French statute which conferred jurisdiction was cited in the defendant's plea. It is true that in this case no distinct evidence as to this matter of jurisdiction was given before the magistrate and the appellant tendered none here. This Court, however, does not and no English Court dealing with questions of nullity of marriage ought to proceed upon mere assumptions or even on mere admissions. Lord Stowell had to consider in a case of *Sinclair* v. *Sinclair* (2) the effect to be given to a foreign judgment of nullity, and he laid it down that such a judgment is open to examination here. The relevant passage was cited in full in the judgment of the Court of Appeal in *Ogden* v. *Ogden* (3), and includes this statement: "Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper court, for

(1) 12 Cl. & F. 368, 401.
(2) (1798) 1 Hagg. Cons. 294, 297.
(3) [1908] P. 46, 79.

adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding." Upon reference to the Orders in Council relevant to this case (Orders in Council, I. of 1879, s. 71; Courts of Justice Orders, 1882, ss. 4, 5 and 22; 1883, s. 2), to which, after prolonged general argument, the Court called the attention of the parties, it is clear that the entire jurisdiction in matrimonial causes which in 1914 was exercisable in Cyprus by any of His Majesty's Courts there was, as it apparently still is, a jurisdiction from which the power to dissolve marriage and the power to decree nullity of marriage are expressly excepted. The suggestion of a possible foundation for the decree in prescriptive or customary law, not put in evidence is of no effect. The Court in question is a Court of His Majesty the King which has its being under Orders in Council and has thereunder a jurisdiction in matrimonial causes which is perfectly defined. These Orders in Council are, at any rate since the annexation of Cyprus, receivable in evidence here under the Colonial Statutes Act, 1907. They show the status of the District Court, its relation to the superior tribunals, and the conditions under which certain powers of the higher Courts of the island might be exercised there by consent of the parties. No such consent could enlarge this last mentioned jurisdiction. The decree of 1914, now in question, cannot be regarded as anything more than a judicial recognition of a compact made between the parties to the effect that this marriage in England should be treated by them both as a nullity, and that in consideration

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of the plaintiff's assent to this she should receive 380*l*. It is not a judgment in rem, nor is it a judgment of a Court whose jurisdiction rendered it competent to determine upon the validity of the marriage.

Regarding the decree as the evidence of an agreement, counsel for the appellant submitted that if it might be held void in part it is yet on the face of it severable. It is true that if one memorandum contains two or more distinct and independent contracts they must be judged individually. The principle is illustrated in *Hopkins* v. *Prescott* (1), where the Chief Justice, then Sir Thomas Wilde, drew the decisive distinction between " an agreement which is single and entire made on one entire consideration " and " one that is severable in its nature and deals with matters that are unconnected with, and independent of, each other. . . . ." The agreement here in question is " single and made on one consideration." The broad effect of the agreement is to authorize each of the parties to disregard their marital obligations, to treat the same as non-existent. An agreement to take a child out of the control of its father was held invalid by Lord Hatherley (then Wood V.-C.), in *Walrond* v. *Walrond*. (2) An agreement as to property made in contemplation of marriage to be contracted abroad with a deceased wife's sister was dealt with in the same way by Sir John Romilly M.R. in *Chapman* v. *Bradley*. (3) In *Brodie* v. *Brodie* (4), a deed executed before marriage in which the parties agreed not to cohabit was pronounced void. As was said by Sir George Jessel M.R. in *The Printing & Numerical Registering Co.* v. *Sampson* (5): " contracts . . . to induce another to do something against the general rules of morality . . . . have always been held to be void." The agreement here in question was illegal as well as immoral, and cannot be set up by either of the parties in an English Court.

These conclusions deal with all the grounds of the appeal. There is no notice of appeal as to the weekly amount ordered

(1) (1847) 4 C. B. 578, 593.
(2) (1858) 1 John. 18.
(3) (1863) 33 Beav. 61.
(4) [1917] P. 271.
(5) (1875) L. R. 19 Eq. 462.

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by the learned magistrate to be paid. The magistrate was right in holding that the parties were husband and wife, and upon the facts before him he had no alternative but to hold also that the husband had wilfully failed to maintain the wife. Under the statute which regulates his jurisdiction he could not go further, and inquire into the general conduct of the parties. This appeal therefore fails.

HILL J. I agree. The first question for the magistrate was whether the applicant was a married woman and the wife of the defendant. She was, unless the marriage of November 27, 1912, at the Holborn Registry Office had been dissolved or declared null and void by a Court of competent jurisdiction. No Court has purported to dissolve it. The District Court of Nicosia purported to declare it null and void. Now that the matter has been investigated it is clear and was on the further argument before us conceded that that Court had no jurisdiction to make such a declaration. The parties could not by consent give it jurisdiction. The marriage is therefore a subsisting marriage, and the magistrate rightly found that the applicant was a married woman and the wife of the defendant, the present appellant.

The next question for the magistrate was whether the husband had wilfully neglected to provide reasonable maintenance for the wife. No question arises whether the husband's neglect, if any, was wilful. It was not wilful during the years 1914 to 1929 while the wife was living apart from and making no claim upon the husband. But after the letter of the wife's solicitor of March, 1929, and the husband's reply it was wilful. The question is whether the husband neglected to provide maintenance. He did not in fact provide maintenance. Neglect means failure in a duty to provide maintenance, and the question is whether he was under a duty to maintain the wife. Prima facie he was. That is the common law of England, and it was for the husband to show that he was excused from that duty. A husband may show it in various ways. For instance, he may show that his wife has been guilty of adultery, neither condoned nor connived at, nor conduced to by the husband, or that she had deserted him and was continuing to desert him, or that there is a subsisting binding contract performed and not repudiated by him that she should not claim maintenance otherwise than as provided by the contract, or that a Court of competent jurisdiction in a proceeding between husband and wife had already determined the rights of the wife in respect of maintenance and that he had fulfilled the obligations so imposed on him. But the onus is on the husband to prove the excuse. In the present case the husband contends that he was excused first by the decree of the District Court of Nicosia and, secondly, by the agreement between husband and wife embodied in that decree. As to the first argument, in the proceedings before it the Court was not a Court of competent jurisdiction to make a decree as to maintenance. Its powers as to maintenance were the same as the powers of the High Court of Justice. Having no power to declare the marriage null and void, it had no power to make an order for maintenance consequential upon a decree of nullity. It had no power to make a decree of dissolution and did not purport to do so, neither did it purport to make a decree of restitution of conjugal rights or of judicial separation, and therefore it had not the power to make an order for maintenance consequential thereon. Without a precedent decree it had no power to make an order for maintenance. Apart from the power to order alimony pendente lite the High Court of Justice has no such power (though a magistrate has) and, therefore, the Court in Cyprus had no such power. If it had no power to make an order for maintenance it had no power to give a lump sum in lieu of maintenance. It does not purport to make any award in respect of maintenance of a wife; it awards a lump sum on the footing that the woman is not a wife. Consent makes no difference; the husband and wife could not by consent give the Court jurisdiction to declare that the woman was not a wife, or to make any order upon that footing. You cannot separate one part of the decree from any other part. It is all one decree. As to the second argument the agreement was as follows: If you, the husband, will pay me 380*l.* I the wife will agree that the marriage is null and void, and consent to the Court so declaring, and I will make no other claim upon you either for maintenance or damages for breach of promise or services rendered or money lent: if you, the wife, will agree that the marriage is null and void and consent to the Court so declaring and undertake to make no claim upon me either for maintenance or damages for breach of promise or services rendered or money lent, I will pay you 380*l.* It is all one agreement. The agreement that the marriage is null and void is not severable; it is part of the consideration for the promise of each. If the agreement as to nullity is unlawful, the whole agreement is unlawful. The agreement as to nullity is manifestly unlawful. It involves a licence of each to the other to marry again and, therefore, to commit adultery. Therefore the husband could not set up the agreement as an excuse. There being no excuse on which the husband could rely the magistrate rightly found that the husband continued under a duty to maintain the wife, and had failed to discharge that duty and, therefore, had in the terms of the section neglected to maintain her.

The third point that arose for the magistrate was this: having found a neglect to maintain the magistrate had to fix an amount. His power and duty in this matter are fixed by the statute under which he acts, "such weekly sum not exceeding 2*l.* as the Court shall, having regard to the respective means both of the husband and the wife, consider reasonable." The words are not the same as the words of ss. 187 and 190 of the Judicature (Consolidation) Act, 1925, which define the powers of this Court, after a decree of nullity or dissolution, or a decree of judicial separation or restitution of conjugal rights. By s. 190, sub-s. 1, this Court may have regard to "her fortune, if any, to the ability of the husband and to the conduct of the parties." By s. 190, sub-s. 4, the words are "think just," and by s. 190, sub-s. 2, "think reasonable"; and by s. 187, sub-s. 1, "may be just." Sect. 5 (*c*) of the Summary Jurisdiction Act, 1895, is much more limited. It confines the matter to be considered to the means of the husband and wife. If in this Court the wife could ever have

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obtained any decree upon which an application for maintenance could be based, this Court would have been free to consider the conduct of the parties—the fact that in 1914 the husband had paid the wife 380*l.*, and that they had lived apart ever since, without any claim by the wife and so forth. But the magistrate can only consider the means of the parties at the time he makes the order. No evidence seems to have been given as to the means of the wife, but that point is not raised. It is not disputed that, having regard to the means of the husband and wife, 2*l.* was a reasonable sum. Therefore I think the appeal fails.

Appeal dismissed with costs.
Leave to appeal on giving security.

Solicitors for appellant: *William Gorringe & Co.*
Solicitors for respondent: *Martin & Barry O'Brien.*

R. M. M.

NOTE.

Ordinance, January 17, 1879.

Sect. 71: "The Court, by the Judicial Commissioner, shall be a Court for matrimonial causes, and, as such, shall, as far as circumstances admit, have all such jurisdiction, except the jurisdiction relative to dissolution or nullity or jactitation of marriage, as for the time being belongs to the High Court of Justice in England in matrimonial causes."

The Cyprus Courts of Justice Order, 1882, November 30, 1882.

Sect. 4: "There shall be established in Cyprus a Court to be called, 'The Supreme Court,' to be constituted of two or more judges, one of whom shall be designated the Chief Justice and the other or others the Puisne Judge or Puisne Judges of the said Court.

"The Chief Justice shall be the President of the Supreme Court."

Sect. 5: "There shall be established in each of the Cazas or administrative divisions of Cyprus, a Court to be called the District Court of such Caza, which shall exercise jurisdiction within such Caza, and shall be constituted of three judges, of whom one shall be designated the President and the two others Ordinary Judges. One of the ordinary judges of each District Court shall be a Christian and the other a Moslem."

Sect. 22: "All jurisdiction, criminal and civil, over all persons and in all cases heretofore within the jurisdiction of the Queen's High Court of Justice for Cyprus, shall, subject and according to the provisions of this Order be vested in and exercised by the Magisterial Courts, the Presidents of the District Courts, the Assize Courts and the Supreme Court and by the consent of the parties in and by the District Courts."

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The Cyprus Courts of Justice Order, 1883, February 14, 1883.

Sect. 2: "From the time at which the Cyprus Courts of Justice Order, 1882, shall come into effect all the jurisdiction which now belongs to the Queen's High Court of Justice for Cyprus (hereinafter called the High Court) as a Court of Bankruptcy, or as a Court of Matrimonial Causes or as a Court of Probate, or in relation to the custody and management of the persons and estates of persons of unsound mind; and all powers and authorities now vested in the High Court incident to the exercise of any such respective jurisdiction and all jurisdiction powers and authorities now belonging to, vested in, or exercisable by the High Court or the Judicial Commissioner, for the exercise of which no special provision is made by the Cyprus Courts of Justice Order, 1882, or by this Order, shall belong to and be vested in and exercisable by the Supreme Court of Cyprus and by no other Court."

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Nov. 6, 13.

G. *v.* G.

Restitution of conjugal Rights—Plea of just Cause—Defences in Law to Petition for Restitution—Extravagance in Living of Petitioner—Necessary Place of Residence of Respondent.

Extravagance of living on the part of a wife affecting the financial position and prospects of her husband may be a matter "so grave and weighty" within the decision in *Yeatman* v. *Yeatman* (1868) L. R. 1 P. & M. 489) as to render it contrary to the real truth of the case to treat the husband as guilty of desertion without reasonable cause, and therefore may afford a defence to a petition for restitution of conjugal rights.

A husband is not to be taken as having deserted his wife without reasonable cause because his work in life compels him to live away from her.

WIFE'S PETITION for restitution of conjugal rights. Summons to strike out the answer of the respondent as disclosing no defence in law.

The parties were married on May 7, 1912, in India. They cohabited in India and in England. There was one child of the marriage born on December 8, 1916.

On June 6, 1929, the wife filed a petition for restitution of conjugal rights, alleging withdrawal from cohabitation by the husband in England on April 28, 1929. The husband filed his answer on July 4, 1929, alleging that he had just cause for refusing to live with the petitioner.

Shortly stated the particulars of this answer delivered by the respondent were:—

That he was compelled to live in Calcutta as a member of a firm carrying on business there and could only cohabit in England when on leave. That the petitioner had an allowance of 2400*l.* per annum from him and that notwithstanding she had habitually got into debt with tradesmen and pawnbrokers. That she had borrowed money from moneylenders. That he had paid her debts amounting to 10,000*l.* up to 1927, but that she became further indebted to the extent of 7000*l.* in 1928. That she had borrowed money from his friends and had attempted to obtain an advance on his account from one of his partners. That she had issued cheques which were dishonoured on more than eighty occasions and sold the goods of the respondent and appropriated the proceeds. That in consequence of her notorious indebtedness the respondent's partners wrote to him that if he had his wife to live with him in India he must leave the firm.

The petitioner took out the present summons to strike out the answer as disclosing no defence to the petition in law and alternatively to strike out the particulars as unnecessary and/or embarrassing and/or scandalous and/or irrelevant.

The summons was adjourned into Court.

Bayford K.C. (*Laskey* with him) for the petitioner. The particulars delivered disclose no answer to the petition. The question is whether the respondent had a reasonable cause for leaving the petitioner: *Russell* v. *Russell.* (1) The cause must be "grave and weighty": *Yeatman* v. *Yeatman.* (2) The Court has a discretion in the matter: *Haswell* v. *Haswell and Sanderson.* (3) In *Williamson* v. *Williamson* (4) a conviction of a criminal offence was held no justification for refusing to cohabit with the party convicted. In *Oldroyd* v. *Oldroyd* (5) the test is stated to be whether "it has become practically impossible for the spouses to live properly together." The first duty of the respondent is to provide a home for his wife, and her extravagance does not render that impossible. In *Greene* v. *Greene* (6) intemperance with its concomitant results was held not to come within the principle of *Russell* v. *Russell* (1); and *Oldroyd* v. *Oldroyd.* (2)

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(1) [1895] P. 315, 334.

(2) L. R. 1 P. & M. 489, 494.

(3) (1859) 1 Sw. & Tr. 502.

(4) (1882) 7 P. D. 76.

(5) [1896] P. 175, 184.

(6) [1916] P. 188.

[HILL J. The respondent says: I will not live with you. India is the only place where I can live with you and my partners will not have you there."]

Even if he incurs monetary losses by having to leave his firm he is still bound to cohabit.

Willis K.C. (*T. Bucknill* with him) for the respondent. The issue whether the causes for separation are "grave and weighty" to come within *Oldroyd* v. *Oldroyd* (2), and such cases is a matter of evidence not to be determined at the present stage. The question is what was the position at the date of the petition: *Beer* v. *Beer.* (3) The respondent's sincerity in his plea is a question that must await trial as in *Harnett* v. *Harnett.* (4) Both parties are on a similar footing in that respect. The husband is not to be called upon to give up his business, if that is inconsistent with cohabitation.

Cur. adv. vult.

Nov. 13. HILL J. The question for decision is whether the respondent's particulars of answer must be struck out as showing no answer in law to the petition of the wife for restitution of conjugal rights. For the purpose of to-day I must assume that the particulars can be proved. The parties were married in 1912 in Calcutta. In the marriage register the place of residence of both is stated as Calcutta and the rank or profession of the husband as merchant. A child was born in 1916. The petitioner in her petition states that in March, 1921, she returned to England with the child, the respondent remaining in India of necessity owing to the nature of his business. She goes on to state that on April 4, 1929, the respondent returned to England on leave, and on April 28, 1929, withdrew from cohabitation and has refused and still refuses to return to her. She then sets out her letter before petition and states that the respondent said he had no intention of again cohabiting with her; that she asked him to allow her to return with him to India on the expiration of his leave and that the respondent said he had no intention of taking her to India and would not live with her again.

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(1) [1895] P. 315, 334.

(2) [1896] P. 175, 184.

(3) (1906) 22 Times L. R. 338.

(4) [1924] P. 41, 126.

The gist of this is that the husband has refused to make a home for the wife in India and has refused to live with her any more. The withdrawal from cohabitation during the husband's leave would be important as part of a general refusal of cohabitation. But taken by itself the Court would not grant a decree of restitution of conjugal rights merely because a husband spent a holiday away from his wife. By his answer the husband pleads that he had good cause. [The learned judge then read the particulars.] The case set up by the husband comes to this. I am a member of a firm whose business is in Calcutta and I am compelled to reside there. My wife by persistent extravagance over a number of years has largely exceeded the allowance at the rate of 2400*l.* a year made to her and has incurred very heavy debts. I paid them off in 1920, 1925 and 1927 to the extent of about 10,000*l.*, and in 1928 she incurred further debts to the amount of about 7000*l.* She has borrowed from moneylenders. She has issued many cheques which have been dishonoured. She has tried to borrow money of my friends and on one occasion tried to get one of my partners to make her an advance on my account. By these and other proceedings set out in the particulars she has brought things to such a pass that my partners have said that if I take my wife to live with me in India I must leave my firm.

In my judgment if these facts are proved the husband would show reasonable cause for refusing to have his wife to live with him in India. The reasons would be "grave and weighty." It would be contrary to the real truth of the case to treat as deserting his wife a husband who in these circumstances refused to have his wife to live with him in India and instead offered to maintain her elsewhere.

Counsel for the wife says that that does not dispose of the matter, for the husband can return to England and there make a home and live with his wife. This argument is not

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sound. A husband is bound to maintain his wife and child and therefore to earn a living, and correlatively it is for him to choose how and where he shall earn a living. If his choice is genuine and not merely a cloak to avoid living with his wife I know not on what ground it can be said to be a breach of duty to the wife.

Further, this argument ignores the contractual element of marriage. If a woman marries a man whose work in life compels him to live out of England she impliedly agrees that he should not be compelled to live with her in England. Suppose that she had married not a Calcutta merchant, but an Indian civil servant, it would be obvious that she agreed to his being in India while his work required it. It would be easy to multiply illustrations of the same principle.

To say that the particulars if proved disclose good cause for the husband's refusal is not to say that there will always be good cause. Circumstances may change. All that I decide is that to the present claim of the wife for a decree of restitution of conjugal rights in existing circumstances the answer if proved will establish a defence in law.

Summons dismissed. Costs in cause.

Solicitors for the petitioner: *Kenneth Brown, Baker, Baker.*

Solicitors for the respondent: *Andrew, Wood, Purves & Sutton.*

R. M. M.

STUART *v.* STUART AND HOLDEN.

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Nov 7, 8, 12;
Dec. 9.

(MOON SHOWING CAUSE.)

Divorce—Adultery of Petitioner—Discretion to grant Decree—Material Facts not brought before the Court—Cause shown by third Party, against Decree Absolute—Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 183, *sub-ss.* 1, 2*—Necessity for frank Disclosure by Petitioner seeking Discretion—Denial on Oath by Petitioner—Refusal to exercise Discretion.*

If a petitioner seeking a decree on the ground of the adultery of the respondent has himself been guilty of adultery, complete frankness in the disclosure of it is a paramount condition of the exercise of the discretion of the Court in his favour.

Although the facts are such as might warrant the exercise of the discretion, if disclosed as material facts at the hearing of the suit, their suppression then and the denial of them when set up in subsequent proceedings as cause for not making the decree absolute render the exercise of the discretion in such a case mischievous as an encouragement to perjury.

CAUSE SHOWN by a third party against a decree nisi for divorce being made absolute under the Judicature (Consolidation) Act, 1925, s. 183, sub-s. 2, by reason of material facts not having been brought before the Court.

The petitioner, Francis David Stuart, filed a petition for dissolution of his marriage with Gertrude Annie Stuart, the respondent, on December 16, 1927, on the ground of her adultery with William Holden. On October 24, 1928, the President (Lord Merrivale) delivered judgment on the hearing of the petition finding the charges in the petition proved and pronouncing a decree nisi with an order for the respondent's costs. On May 1, 1929, appearance was entered in the suit by one William Henry Moon to show cause against the decree nisi being made absolute. W. H. Moon filed affidavit evidence alleging the adultery of the petitioner with Isabella Allan Dallas at various places on dates before the decree nisi. On June 4, 1929, the petitioner obtained leave to answer the affidavits filed by W. H. Moon, and on June 8, 1929, the petitioner filed an answer denying adultery. On June 17, 1929, Bateson J. made an order in chambers that the issue of the petitioner's adultery with I. A. Dallas should be tried on oral evidence before a judge without a jury. The issue was tried on November 7, 8 and 12, 1929, before Hill J. The petitioner gave evidence in denial of the charge against him and was examined and cross-examined at length. At the conclusion of the trial the Court found two out of four charges of adultery established against the petitioner and condemned him in the costs of W. H. Moon. On November 15, 1929, the petitioner gave to W. H. Moon notice of motion for the making absolute of the decree nisi notwithstanding the finding of adultery against the petitioner. On November 19, 1929, W. H. Moon gave to the petitioner counter notice of motion for the rescission of the decree nisi, the dismissal of the petition, and the condemnation of the petitioner in the costs of W. H. Moon.

1929. Dec. 9. *R. F. Bayford K.C.* (*H. D. Grazebrook* with him) for the petitioner. The decree should be made absolute. The denial on oath by the petitioner of the charges against him is no ground for refusing him a decree, although the Court has not believed that denial: *Pretty* v. *Pretty* (*the King's Proctor shewing cause*). (1) The Court can exercise its discretion and grant the petitioner a decree. It should do so even at the present stage.

Sir P. Hastings K.C. (*G. C. Tyndale* with him) for W. H. Moon were not called on.

W. Frampton for the wife.

G. G. Raphael for the co-respondent.

HILL J. To my mind this case is quite clear. It may well be, and I will assume that, on the merits of this case, if the husband had made a full disclosure of the adultery which has been proved against him at the time he was complaining of his wife's adultery the Court would have thought it was a case in which it ought to exercise its discretion in favour of the husband. I will assume that. I have not heard any one to the contrary, and therefore I only say that I assume that.

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(1) [1911] P. 83.

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In general where there is no prospect of the parties coming together I am very much in favour of exercising the discretion of the Court and dissolving the marriage. On the whole I think it serves the cause of morality that it should be so, and I welcome the development of the law which has taken place in the last twenty or thirty years in that direction.

But this is a case where the husband not only did not make a disclosure of his own adultery at the time he was seeking a decree nisi against his wife, but when the charge was made against him he strenuously denied it, fought it throughout, and gave evidence upon oath and was disbelieved by the Court. If in those circumstances the Court is still to exercise its discretion on behalf of a man who is not only an adulterer, but a perjurer, it would be to encourage people to perjury, first of all to concealment and then to perjury, and every one who is guilty and himself seeking relief from the other spouse would be encouraged to run the risk of first of all making no disclosure, in the hope that the Court would be hoodwinked, and secondly, of successfully perjuring himself. I think that that would be making a most mischievous use of the Court's power to use its discretion on behalf of a spouse who has been guilty of adultery.

It is the condition upon which the Court can properly exercise its discretionary power that there should be complete frankness on the part of those who are asking for its discretion. Therefore, even assuming that if all the facts had been disclosed by the petitioner on the hearing when asking for a decree nisi the Court would have exercised its discretion in his favour, after the course he has chosen to pursue I am satisfied it is not a case in which the Court ought to exercise its discretion.

I therefore rescind the decree nisi and dismiss the petition.

The following was the order made as to costs :—

It is ordered that the motion of the petitioner to make absolute the decree nisi herein be dismissed and that the petitioner do pay the costs of W. H. Moon and the respondent thereof, and on the cross-motion of W. H. Moon it is further ordered that the decree nisi made herein on October 24, 1928, be rescinded without prejudice to the order for the respondent's costs contained therein and the petition dismissed and that the petitioner do pay the costs of W. H. Moon of the said cross-motion.

Solicitors for the petitioner: *Ridsdale & Son*

Solicitors for the respondent and W. H. Moon: *Kenneth Brown, Baker, Baker.*

Solicitors for the co-respondent: *Raymond Oliver & Co.*

R. M. M.

1929
Nov. 25;
Dec. 19.

PASTRE *v.* PASTRE.

Divorce—Practice—Judicial Separation—Permanent Alimony—Dissolution of Marriage—Discharge of Order for Alimony—Basis and Duration of Alimony—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39).

The basis of a wife's right to receive permanent alimony from her husband is that the marriage is subsisting and that she is still a wife. If after a decree for judicial separation and an order for the payment of alimony the marriage is put an end to by the decree of a Court of competent jurisdiction the status of the woman as wife and her consequential right to alimony have ceased to exist. The order for alimony, however, which in its common form is limited till further order, remains effective till an application is made for its discharge.

Weiss v. *Weiss* (1908), an unreported decision of Sir Gorell Barnes on this point (Rayden on Divorce, 2nd ed., p. 390), commented on.

MOTION for the declaration of the abatement of an order for the payment of permanent alimony or for an order for its discharge.

On March 1, 1909, Elisa Pastre, the wife, obtained a decree of judicial separation in this Court against Pierre Pastre, the husband, on the ground of his adultery.

On March 18, 1909, an order was made for permanent alimony at the rate of 1*l*. 5*s*. per week. On March 4, 1926, the respondent husband obtained a decree in the Court of his domicil (which was French) converting this separation into a divorce a vinculo according to a provision of French law—namely, on the ground of the parties having been judicially

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separated for three years. On appeal by the petitioning wife the divorce was affirmed by the French Court of Appeal on April 7, 1927.

On July 8, 1929, the husband gave notice of the present motion for a declaration that the order for alimony had abated or alternatively for an order for its discharge.

Cotes-Preedy K.C. (*H. W. Barnard* with him) for the husband. In an unreported case of *Weiss* v. *Weiss* (1), where a decree of judicial separation was pronounced at the instance of the wife on the ground of the disobedience of the husband to a decree of restitution of conjugal rights and the husband was ordered to pay alimony, a divorce was subsequently decreed in the (German) Court of the domicil of the husband, and the order of this Court for alimony was treated as inoperative as from the date of the German decree and was so declared by an order of Gorell Barnes J. on certain terms imposed by the Court. The case is a precedent for the cesser of the order for alimony after the marriage has been terminated by divorce, whether a special application for the purpose is necessary or not. Alimony (2) is an allowance for the maintenance of a wife.

In this case the woman has ceased to be a wife by virtue of the decree of a Court of competent jurisdiction, and *Tangye* v. *Tangye* (3) is an authority for the proposition that alimony is not a permanent provision but one limited to the duration of the marriage.

F. L. C. Hodson for the wife. There has been no finding by this Court of a French domicil of the parties as a fact. The wife does not admit the validity of the French decree, and the marriage being English is prima facie dissoluble only in this Court. A maintenance order obtained by a wife from a

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(1) 1908. Rayden on Divorce, 2nd ed., p. 390, and the extract from the original judgment below.

(2) "Alimony .... is the allowance to be made to a wife for her maintenance either during a matrimonial suit or at its termination. Alimony .... signifies that proportion of the husband's estate which the wife sues the Ecclesiastical Court to have allowed her for her present subsistence and livelihood": Shelford. Law of Marriage and Divorce, 1841, p. 586.

(3) [1914] P. 201.

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court of summary jurisdiction is not discharged merely by the dissolution of the marriage: *Bragg* v. *Bragg*. (1) That is analogous to the present case. It was there argued that the order for the allowance went with the decree of dissolution. The order for alimony is expressly limited till further order on the face of it. The Court has a discretion. The husband has no absolute right to the termination of the order for alimony, and the Court will not relieve him of his liability under the order except on the terms of a provision being made for the wife.

Cotes-Preedy in reply.

Cur. adv. vult.

Dec. 19. HILL J. [after stating the facts:] The decree of the French Court was made upon a ground which would not be a good ground here—namely, the existence for three years of a decree of judicial separation. But it is the decree of a Court of competent jurisdiction in a proceeding in which the wife was an active party. It follows that the petitioner and respondent are no longer husband and wife. The decree of judicial separation was a decree separating a husband and a wife; it is a decree based on the continuance of the marriage relation. The order for alimony was consequential upon the decree of judicial separation; it was an order that the respondent as husband should pay to the petitioner as wife 25*s*. a week. It was expressed to be until further order, and until further order, in my opinion—and I think it is conceded—it is effective. I am now asked to make a further order—namely, to discharge the order for payment in the future. In my opinion I have no alternative but to do so. I cannot order a man who has ceased to be a husband to pay alimony to a woman who has ceased to be a wife. The whole basis of an order for permanent alimony is gone. I have looked at the record of the case of *Weiss* v. *Weiss* in 1908; it is an unreported case, but is referred to in Rayden on Divorce. On looking at the record I find as follows: that on June 6, 1904, the wife obtained an order for judicial separation, based on disobedience to an order for restitution of conjugal rights. On July 8, 1904, the wife obtained an order for permanent alimony at the rate of 220*l.* per annum. Subsequently the order for permanent alimony was reduced to 150*l.* for two years and 220*l.* thereafter. On February 29, 1908, the following order was made by Sir Gorell Barnes, P.: "On hearing counsel for the respondent, the petitioner in person, her former solicitors and counsel instructed by the Official Solicitor for the benefit of the petitioner and reading the affidavit of the respondent sworn February 12, 1908, in which it is stated that he is a native of Germany residing in England for business purposes and meaning to return to Germany and domiciled there, no evidence being adduced to the contrary of the said statement on oath as to domicil The President being of opinion that the effect of the decree dated January 26, 1905, in the Landgericht at Berlin and the decree dated February 18, 1907, in the Kammergericht at Berlin referred to in the affidavit of the respondent which latter decree appeared on its face to become final on June 1, 1907, was to put an end to the proceedings in this Court as from the date on which it became final declared that the two orders dated respectively July 20, 1904, and December 15, 1904, the former of which inter alia gave the petitioner the custody of Lily Weiss the child issue of the marriage between the respondent and the petitioner and the latter of which ordered the respondent to pay the petitioner alimony at the rate of 150*l.* a year from its date and the third order dated January 14, 1905, under which the said alimony was ordered to be restored to 220*l.* a year after the expiration of two years from December 15, 1904, the date of the previous order until further order, had ceased to be operative from the said June 1, 1907, except as regards costs incurred by the petitioner before that date and unpaid by the respondent for which he was liable under orders for costs and except as regards alimony payable up to the said June 1, 1907, by the respondent to the petitioner (both of which are to be settled by the Registrar in case of dispute) and the respondent undertook to pay the petitioner 1*l.* a week from January 29, 1908, so long as she does not molest him he on his part agreeing not to molest her and to permit her to have access to Lily Weiss the child of the marriage and Robert Weiss the son of the petitioner and the respondent born before marriage once a fortnight subject to school regulations. The above declaration not to be operative until payment of the said costs and alimony due to the petitioner prior to June 1, 1907, shall have been made. Leave to the petitioner to appeal." There was an appeal which was dismissed. It is to be noticed that Sir Gorell Barnes treated the alimony order as inoperative as from the date of the final decree—or rather from the date when the decree of the German Court became final. But as I have said, in this case I do not think it is contended that the order for alimony becomes inoperative until it is set aside, and in my view it would be operative until set aside. That is only a detail, but what does appear from this case is that Sir Gorell Barnes went further than I am disposed to go and treated the final decree in Germany—which I take it dissolved the marriage, I think we must infer that—as operative to put an end to the order for alimony. It will be observed that the respondent undertook to pay 1*l.* a week for the future. That cannot have been by consent, because there was an appeal, and the appeal was heard. Nor in terms was it a condition imposed by the Court upon the respondent. He gave an undertaking, and in my view it must have been a voluntary undertaking. I do not see how I have any power to impose any terms now that the marriage has been dissolved; and that fact being brought to the notice of this Court, this Court is, as I think, bound to treat the petitioner and respondent as being no longer husband and wife, and is, therefore, bound to make a further order under the alimony order based on that fact. I do not think this Court has any power to impose any condition. Therefore, I think my order must be a further order discharging the order for alimony as from to-day.

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(1) [1925] P. 20.

I was referred to the case of *Bragg* v. *Bragg*. (1) Of course, I am bound by that decision; it is a decision of the Divisional

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(1) [1925] P. 20.

Court, but it was a decision upon the terms of the Summary Jurisdiction (Married Women) Act, an Act known to be of a very special nature which gave magistrates powers which this Court does not possess in some respects, and I think it was conceded that a decision upon that Act really in no way binds me in the case under the Act which I have got to interpret. I think it does not assist me.

Order for alimony discharged. Leave to appeal on petitioner giving security, if out of jurisdiction.

Solicitors for the petitioner: *Hicks, Arnold & Bender.*
Solicitors for the respondent: *De La Chapelle, Thirlby & Co.*

R. M. M.

NACHIMSON *v.* NACHIMSON.

1929
Dec. 12, 17.

Husband and Wife—Marriage—Definition of Contract and Status—Lex loci contractus—Foreign Law—Defeasance of Contract or Status by Consent or at Will of one Party—Registration of Defeasance and of Termination of Status—No Proof of Causes for Defeasance—No Act of State terminating Status—Parties to Contract not Husband and Wife according to English Law—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 21, *Part VIII., s.* 185.

Marriage is a voluntary union for life of one man and one woman to the exclusion of all others, subject to dissolution only for specific causes and by due process of law. Without this species of union there is no marriage in the English acceptance of the term. Marriage contracted under a local law which makes it defeasible by mutual consent or at the will of one party, with merely formal conditions of official registration, does not comply with the essentials of marriage in English law and will not be recognized by an English Court.

A man and a woman both domiciled Russians entered in Russia into a contract accepted by local law as one of marriage but subject to defeasance in the manner stated, which defeasance was alleged to have been subsequently effected by the man:—

Held, in subsequent proceedings by the woman in this Court, that the nature of the union formed did not permit this Court to recognize it as a marriage or entertain a matrimonial suit with reference to it.

TRIAL OF ISSUE.

Serafima Ilyinitchna Nachimson, petitioner in a matrimonial suit, was married to the respondent Gregory Michailovitch

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Nachimson on March 19, 1924, at the Moscow Provincial Registration Office, Krasno Presna Section, Moscow, according to the acceptance of "marriage" in the local law, their domicil being Russian. At material times the parties cohabited in England and had a female child born on November 2, 1925. On January 29, 1929, the marriage was, as the respondent alleged, dissolved at the Consulate General in Paris of the Union of Soviet Socialist Republics at the instance of the respondent by his ex parte registration of the fact. The petitioner filed the present petition in this Court dated March 9, 1929, praying a judicial separation on the ground of the cruelty of the respondent. The respondent appeared under protest and on April 15, 1929, the Court at first directed the trial of an issue whether the marriage had been dissolved by decree of the Consular Court.

On the case next coming before the Court on November 1, 1929, the previous order for trial of an issue was discharged, the respondent admitting that the point stated in the issue did not arise, with liberty to apply for the trial of any further issue.

On November 11, 1929, accordingly the following questions were ordered to be tried before the hearing of the petition—namely :—

Have the petitioner and the respondent ever been husband and wife ? If yea :

(*a*) Were the parties domiciled in Russia on January 29, 1929 ? and

(*b*) Was their marriage dissolved on that day ?

Various interlocutory proceedings took place in the suit in which by his answer to the petition the respondent denied the charges against him, denied that either he or the petitioner were ever domiciled in England, and counter-charged the petitioner with having committed adultery.

At the hearing of the issue the evidence of several experts in Russian law was admitted. They were not unanimous whether the registration of the dissolution of the marriage in Paris was effective to dissolve it, but they agreed as to the nature of the union between the parties and the way in which in general it could be dissolved. They agreed that it could be terminated either by mutual consent or the unilateral desire of one party. The effect of their evidence as to the manner of dissolution is stated in the judgment.

Both parties now contended that there had been such a relation of husband and wife as to give this Court jurisdiction.

Bayford K.C. and *F. L. C. Hodson* for the respondent. A valid marriage in English law has been defined as a voluntary union for life of one man and one woman to the exclusion of all others: *Hyde* v. *Hyde and Woodmansee.* (1) If this relationship is once constituted the contract is binding and cognizable by this Court without regard to any question of the subsequent dissolution of the tie. That does not affect the binding nature of the contract itself: *Harvey* v. *Farnie.* (2) But if the country where the contract is formed permits the termination of it by consent, the lex loci contractus may have the effect of determining the duration of the marriage. It is a condition which that law attaches to the contract: *Sottomayer* v. *De Barros.* (3) Divorce is a matter of status depending on the law of the domicil.

So long as the cardinal definition of a marriage in *Hyde* v. *Hyde and Woodmansee* (1) is fulfilled it is not necessary that the Christian practice with regard to marriage in other respects should be observed. In *Brinkley* v. *Attorney-General* (4) a Japanese marriage of an English man and a Japanese woman was held a valid marriage in English law, because it conformed to the definition. A valid marriage may be determinable, but that does not affect its validity. The law of the domicil applies, and in this case the law of the domicil was Russian and dissolution is regulated by that law.

[HILL J. How can the substance of the contract depend upon its dissolution at a later date? Is "marriage" within the meaning of Part VIII. of the Judicature (Consolidation) Act, 1925, the same thing as "marriage" in the Russian sense?]

(1) (1866) L.R. 1 P. & M. 130, 133.
(2) (1880) 6 P. D. 35, 48, 49.
(3) (1879) 5 P. D. 94, 101.
(4) (1890) 15 P. D. 76.

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The effect of *In re Bethell. Bethell* v. *Hildyard* (1) is that the test of validity to be applied to a marriage in a foreign country is whether it complies with the definition in *Hyde* v. *Hyde and Woodmansee.* (2) The judgments in *Rex* v. *Superintendent Registrar of Marriages, Hammersmith* (3), are to the same effect.

Serjeant Sullivan K.C. and *Eric Dance* for the petitioner. The definition of marriage in *Hyde* v. *Hyde and Woodmansee* (2) once accepted, the test is not the defeasibility of the contract but whether that contract was valid ab initio. In *Warrender* v. *Warrender* (4) Lord Brougham said: "Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it: if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing *in pais* to separate, every other country ought to sanction a separation had *in pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted that so absurd a proposition never could for a moment be entertained." Any contract of marriage of unquestioned validity in its inception might by a subsequent change of domicil of the parties become subject to the Russian law on the question of defeasance. It is true that that defeasance may be on grounds unknown to English law, but it is regulated by the local law of the domicil at the time and not by the lex loci contractus. A Russian pair might marry in London with due formality and the contract itself and the status would remain that of Christian marriage while it lasted. The contract might be interfered with in Moscow subsequently, but that defeasance has no bearing on the validity of the contract ab initio. The language of Lord Brougham in *Warrender* v. *Warrender* (4) is the foundation of the decision in the comparatively recent case of *Rex* v. *Superintendent Registrar of Marriages, Hammersmith.* (3)

Cur. adv. vult.

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(1) (1888) 38 Ch. D. 220, at p. 234.

(2) L. R. 1 P. & M. 130, 133.

(3) [1917] 1 K. B. 634.

(4) (1835) 2 Cl. & F. 488, 534.

Dec. 17. HILL J. [after stating the course of the proceedings :] The parties wanted me to decide the second and third questions only. But I am bound first of all to decide the first question. Unless there was a marriage, no question of its dissolution can arise, and the question as to the domicil of the parties at the date of the alleged dissolution is relevant only to the question of dissolution. Unless there was a marriage this Court has no jurisdiction over any of the matters alleged in the petition. The jurisdiction of the High Court in matrimonial causes and matters depends on s. 21 of the Judicature Act, 1925. The manner in which it is to be exercised is regulated by Part VIII. of the Act. That Part defines the right to relief and the powers of the Court. The relief is a relief granted to a husband or a wife, and throughout the sections refer to marriage. Sect. 185 relates to judicial separation, and by sub-s. 1 provides that: "a petition for judicial separation may be presented to the Court either by the husband or the wife," on the grounds specified. It follows that before the Court can grant relief, it must be satisfied that the party seeking relief is a husband or a wife, and that the other party is the wife or the husband of the first party. The first allegation in every petition for judicial separation or dissolution is that on such and such a day and at such and such a place the petitioner was lawfully married to the respondent. When the case comes to hearing that is the first matter to be proved. Unless it is proved the Court has no jurisdiction to decree a judicial separation or a divorce.

For this Court, the question as to the meaning of "husband" and of "wife" and of "marriage" in the English Act of Parliament under which this Court acts is a question of English law.

The nature of the union entered into by the man and the woman who are said to be husband and wife and to be united in marriage, has to be determined by the law of the place where the union was entered into. I have to ascertain what the union was according to the law of the Union of Soviet Socialist Republics and then to ascertain whether it was a marriage within the meaning of English law. For my guidance I may here quote from Lord Brougham's judgment in *Warrender* v. *Warrender*.(1) He says: "The general principle is denied by no one that the lex loci is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a comitas shown by tribunals of one country towards the laws of the other country. . . . . But . . . . they can hardly be said to act from courtesy, ex comitate; for it is of the essence of the subject matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes, shows their intention to bind themselves, nay more, is the only safe criterion of their having entertained such an intention. Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not ex comitate, but ex debito justitiae; and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.

"But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question must always be: Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract" . . . . : "But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries—if that which is called

(1) 2 Cl. & F. 488, 529 to 531.

marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this: and it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer."

There are other parts of this judgment which would have to be considered in reference to the question whether this Court ought to recognize a dissolution such as the dissolution alleged. But for my present purpose, I need quote it no further.

On March 19, 1924, at Moscow the petitioner and respondent entered into the union which is relied on as a marriage. It is common ground that at that time both of them were domiciled in the territory of the Union of Soviet Socialist Republics. The union was registered in the register of civil marriages. The petitioner put in a certificate of marriage certifying that the petitioner and respondent "have joined in wedlock of which the corresponding entry had been made on March 19, in the Register of Acts of Marriage of Civilians for the year 1924." This certificate is issued by the Moscow Provincial Marriage Registration Office, Krasno-Presna Section. The respondent put in a certified "Extract concerning marriage" from the Department for Registration of Acts of Civil Status of the Krasno-Presniansky Soviet, City of Moscow, under the hand of the "Officials who performed the Registration." It is on the face of it a record of a marriage, with the usual particulars. On the margin is the following certificate: "Consulate General of the U.S.S.R. Paris. The marriage has been dissolved the 29/1/29 at the Consulate General the U.S.S.R. in Paris. Certificate Sub. No. 3 of the 29/1/29."

Russian lawyers were called both by the petitioner and the respondent. They were not agreed whether or not a dissolution registered at the Consulate General at Paris effectively dissolved the marriage according to the Russian law. But they were in agreement about the law as to the nature of the union and the way in which in general it could be dissolved. The point of difference was whether it could be dissolved by registration in Paris. This difference of opinion will have to be considered if I have to decide the question whether the marriage was dissolved, and at the same time I shall have to decide whether the husband before January 29, 1929, had acquired an English domicil of choice, a question upon which the evidence has not yet been completed. And at the same time I shall have to consider whether the rule, that this Court regards as binding a decree of divorce pronounced by a Court of the husband's domicil, is to be extended so as to include a divorce effected by registration according to the law of the husband's domicil, and effected without notice to the wife. But for my present purpose—that of ascertaining whether the union was a marriage—there is no difference of opinion as to the law. The marriage was in 1924, and for my present purpose I must take the law as it stood in 1924. On January 1, 1927, the law was altered in a way which has a bearing upon the form of dissolution. But there was no essential alteration in the power to dissolve. Russian law does not recognize religious forms of marriage. Marriage is formalized by way of registration at the appropriate office of registration. The registration is conclusive evidence of the existence of the marriage. Marriage is terminated by the death of one of the spouses. During the lifetime of the spouses, the marriage may be terminated either by the mutual consent of both spouses or by the unilateral desire of either of them. Under the law of January 1, 1927, the dissolution may in all cases be registered at the proper office of registration, and nothing further is necessary. Under the law of 1918—which subsisted in 1924—dissolution by mutual consent might be registered at the proper office of registration, and nothing further was necessary. But, in the absence of mutual consent, an application had to be made to a Court of law, the Court of the residence of either party. It was necessary to summon the other party or show that it was impossible to do so. But the Court had no discretion as to dissolution. Upon a declaration by one party of a desire to dissolve, the Court was bound to make a decree dissolving the marriage. As Dr. Idelson, called for the petitioner, agreeing with Mr. Dobrin, called for the respondent, said: "The judge merely registered the divorce—that was his duty—it was not necessary to have any proof of any causes—mere desire was sufficient."

From this it appears that mere agreement of the parties or the desire of one does not operate a dissolution. Something further was and is necessary—namely, registration in the marriage register or a decree which was, I presume, followed by registration in the marriage register. That must obviously follow from the law which makes the register conclusive evidence of the existence of the marriage. In that sense, an act of state is necessary to dissolve the marriage. The state does not recognize the dissolution unless it has been made in the prescribed form. But in its essence the union is dissoluble at the will of the parties, and indeed at the will of either of the parties. For the purpose of the present inquiry I do not think that it matters whether it is dissoluble by mutual consent or by unilateral desire. It is a union which the parties, or a party, can dissolve at will by complying with the forms prescribed by law. It is none the less dissoluble at will, because the party dissolving, in order to make the dissolution effective, has to call upon a judge or a registrar to record the dissolution, the judge or registrar having no option but to record it accordingly.

The petitioner in evidence stated that when she married she intended the union to be for life. No doubt she did, but she also intended to enter into a marriage under the Russian law. In other words she intended to enter into a union which was dissoluble by the parties in the way I have described. No other union is possible in Russia, unless indeed persons not domiciled there can enter into marriage extraterritorially, for the law recognizes only one form of marriage in Russia—namely, that which is formalized by registration and governed by the law of the Union of Soviet Socialist Republics.

Is such a union upon such terms a "marriage" within the meaning of English law? Do Russian law and English law by the term "marriage" mean the same thing or different things?

In English law a marriage is "the voluntary union for life of one man and one woman to the exclusion of all others." That is the definition of Lord Penzance in *Hyde* v. *Hyde* (1), a definition often cited in later cases. The union must be (*a*) "voluntary"; (*b*) for "life"; (*c*) of one man and one woman to the exclusion of all others. *Hyde* v. *Hyde* (1) and the later cases were mainly concerned with the third branch of the definition. I refer, e.g., to *In re Bethell. Bethell* v. *Hildyard* (2) and *Rex* v. *Superintendent Registrar of Marriages, Hammersmith.* (3) So far as I can discover, the second branch of the definition "for life" has not been the subject of discussion. But the definition as a whole has never been questioned. It is contained in the following passage in *Hyde* v. *Hyde* (1): "But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether

(1) L. R. 1 P. & M. 130, 133.
(2) 38 Ch. D. 220.
(3) [1917] 1 K. B. 634.

persons so united could be considered 'husband' and 'wife' in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions.

"Marriage has been well said to be something more than a contract, either religious or civil—to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

"There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this Institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife.' In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things, laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word 'wife.' But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words 'husband' and 'wife,' but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer," and he then quotes from *Warrender* v. *Warrender.* (1)

Hyde v. *Hyde* (2) was a case of a Mormon marriage, a marriage in terms which permitted polygamy. In *In re Bethell* (3), which turned on a marriage in a Baralong tribe in South Africa, Stirling J. quoted *Warrender* v. *Warrender* (1) and *Hyde* v. *Hyde* (2), and said: "I conceive that, having regard to these authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may bear the name of a marriage, and the parties to it may be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union for life of one man and one woman to the exclusion of all others." In *Rex* v. *Superintendent Registrar of Marriages, Hammersmith* (4), the marriage in question was an English marriage of a Mahommedan domiciled in India.

There can be no question but that a marriage on terms which permit polygamy is not a "marriage" at all within the meaning of English law, even as regards the first wife. It is clear also from those cases that you must ascertain the nature of the union by reference to the law under which it was formed, as Lord Brougham had pointed out in *Warrender* v. *Warrender.* (1) The direct decisions, however, turned on questions of a polygamous or potentially polygamous marriage. In some cases Lord Penzance's definition has been repeated without the words "for life," but it will be seen that those words were not necessary for the particular case. Such cases are *Harvey* v. *Farnie* (1), per Lush J., and *Brinkley* v. *Attorney-General.* (2) I do not doubt that the words "for life" are an essential part of Lord Penzance's definition. In what sense are they used ? It is certain that Lord Penzance knew that the marriage could be dissolved by a Court of competent jurisdiction here and that this Court would give effect to a decree of a Court of competent jurisdiction abroad. When he spoke of a union for life, he cannot have meant a union indissoluble by act of State. Then he must be speaking as regards the parties. The man and the woman are united for life in the sense that they can dissolve the union only in one way—namely, by dying. Whether marriage be regarded from the point of view of a contract of marriage between the parties or from the point of view of the status thereby created, it seems to me clear that it is a union indissoluble by their act. The State, according to its laws in regard to dissolution, may dissolve the marriage, put an end to the status, and discharge the parties from the obligations of the contract. But the parties cannot, either by mutual consent, or at the will of one of them, dissolve the marriage or put an end to the status or rescind the contract. That I take to be the meaning of a " union for life," a union indissoluble by the parties. And this I take not merely to be a rule of English law, but to be the meaning of " marriage " according to the common acceptance in the countries to whose consensus Lord Penzance, and before him Lord Brougham, appealed, countries spoken of as Christian countries, and to-day, perhaps more correctly described as countries which act upon the principles of Christian morality. I may here quote Sir J. Hannen in *Sottomayer* v. *De Barros* (3) : " It is indeed based upon the contract of the parties, but it is a status arising out of a contract to which each country is entitled to attach its own conditions, both as to its creation and duration. In some countries no other condition is imposed than that the parties, being of a certain age and not related within certain specified degrees, shall have contracted with each

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(1) 2 Cl. & F. 488, 529, 531.

(2) L. R. 1 P. & M. 130.

(3) 38 Ch. D. 220, 234.

(4) [1917] 1 K. B. 634.

(1) 6 P. D. 35. (2) 15 P. D. 76.
(3) 5 P. D. 94, 101.

other to become man and wife; but that in these countries marriage is regarded not merely as a contract is clear, since the parties are not at liberty to rescind it."

I hold that "marriage" in English law means a voluntary union of one man and one woman to the exclusion of all others, which is by them indissoluble except by death.

If this be the true meaning of marriage in English law, it is the antithesis of a union which the parties or a party can dissolve at will by complying with the forms prescribed by law.

In Christian marriage, using the term in the wide sense, and in marriage recognized as such by English law, the parties are bound to one another until death, unless the State dissolves the bond. In marriage under the Russian law the parties are bound to one another until death or until one (or both) desires a dissolution and procures the ministerial act of State which gives legal force to the desire. In the one case the promise is: "I take you for my spouse until death parts us." In the other it is: "I take you for my spouse until death or the choice of either parts us."

It may be that the law of Russia, recognizing such a union, attaches legal consequences to it and calls it by a Russian word which is properly translated, marriage. But by the term "marriage" the law of Russia and the law of England do not mean the same thing.

It was strenuously argued that to hold a Russian marriage not a marriage was to confound the contract with the conditions of its defeasance. But the question is whether the contract which includes the conditions of defeasance prescribed by Russian law is a marriage.

I hold that the union of the petitioner and respondent was not a "marriage," and that the petitioner and respondent never were "wife" or "husband," within the meaning of English law.

If I am right in this, I have no jurisdiction to decide any other question. The parties must resort to the Courts of Russia for the ascertainment of their legal rights. I should add that I am fully conscious of the difficulties which will arise from refusing to recognize a Russian marriage as a marriage. Counsel has pointed out some of them. Though counsel was not concerned to point them out, I can imagine difficulties as great which would arise if a Russian marriage were recognized as a marriage. But the difficulties are not made by English law or by the law of other countries which share with England a common view of marriage. They are made by the law of Russia, which has cut itself adrift from the view of marriage hitherto held by civilized communities. Be the difficulties what they may on one side or the other I must decide the case as I understand the law. If I am wrong the Court of Appeal will set me right.

Solicitors for G. M. Nachimson: *Charles Russell & Co.*
Solicitors for S. I. Nachimson: *A. E. Wyeth & Co.*

R. M. M.

MELVILL *v.* MELVILL AND WOODWARD.

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Divorce—Marriage Settlement—Jurisdiction to apply Property settled—Definition of Settlement—"Post-nuptial"—"Parties whose marriage is the subject of the decree"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 191, 192.

A respondent wife after her husband had filed a petition seeking dissolution of his marriage with her on the ground of her adultery, executed a settlement of interests to which she was entitled under a will and under the marriage settlement of her parents, and settled them on herself for life with remainder to any of her children, of whom she had two by her then husband, reserving a general power of appointment by will in default of any surviving children and further reserving a power of appointment both of capital and income in favour of any surviving husband. After decree absolute she executed a deed poll, declaring that her income under the settlement should be for her separate use without power of anticipation. Shortly after the execution of the deed poll she intermarried with the co-respondent in the suit:—

Held, that the settlement was not a "post-nuptial settlement" made on the parties whose marriage was "the subject of the decree," and that on these grounds the settlement was not within the definition in the Judicature (Consolidation) Act, 1925, s. 192, of the class of instrument that the Court has power to deal with under the section.

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PETITION under the Judicature (Consolidation) Act, 1925, s. 192, for the application of property settled by a marriage settlement.

The parties were married on July 30, 1921, and there were two children, a boy born in 1922 and a girl born in 1924.

On October 22, 1928, James Lister Melvill the husband obtained a decree dissolving his marriage with Irene Melvill the wife, on the ground of her adultery with the co-respondent Hugh Woodward. The custody of the children was given to the petitioner.

The divorce petition was filed on May 26, 1927, and after it had been set down for trial as an undefended case on November 16, 1927, the respondent wife on December 30, 1927, executed a settlement of which the co-respondent was one of the trustees by which she settled interests to which she was absolutely entitled on her mother's death, under her grandfather's will and her parents' marriage settlement on herself for life with remainder to any children of the settlor, who being male should attain the age of twenty-one years or being females should attain that age or marry. The settlor was described as the wife of the petitioner in the suit, as, in fact, she still was. The consideration was expressed to be " the natural love and affection of the settlor " for the two children of her marriage, though the settlement was in fact upon any children of the settlor. In default of surviving children power was reserved to the settlor to appoint by will. The settlor also had a power to appoint the income and not exceeding a moiety of the capital of the trust fund to any surviving husband.

The Court was satisfied that the object of this settlement was to prevent property of the wife from coming within the reach of any application that the husband might make under ss. 191 or 192 of the Judicature (Consolidation) Act, 1925, for a settlement of the wife's property or for the application of property settled by a marriage settlement.

The interest of the respondent under her grandfather's will was of the value of about 13,755*l.* or thereabouts, producing an income of nearly 470*l.* net. Her interest under the marriage settlement of her parents, the survivor of whom died in 1928, was of the value of 6235*l.* or thereabouts, producing an income of nearly 325*l.* net.

In addition to her interests involved in the settlement the respondent was entitled on her mother's death under a voluntary settlement made by her parents dated May 22, 1923, to a life interest without power of anticipation in a moiety of the value of 2450*l.*, producing a net annual income of 120*l.*, of the trust funds of the latter settlement. Under the will of her father the respondent took a life interest, also without power of anticipation, in a share of the residue producing about 1013*l.* and a further amount of income derived from shares in a company variously estimated according to contingencies at 3834*l.*, 940*l.* or 1697*l.* On November 29, 1928, the respondent assigned her interests under her father's will and the settlement of December, 1927, to Barclays Bank as security for advances. On December 4, 1929, the amount of these latter outstanding was 1743*l.* By a deed poll dated December 7, 1928, the respondent declared that her income under the settlement of December 30, 1927, should be for her separate use without power of anticipation.

The total available income of the petitioner was reported to be 1728*l.* till 1938, when it would fall to 1330*l.* per annum.

A decree nisi was pronounced in the suit on March 26, 1928, and made absolute on October 22, 1928, and on December 12, 1928, the respondent married Hugh Woodward, the co-respondent in the suit.

On November 6, 1928, the petitioner filed a petition for the settlement of the respondent's property under s. 191, sub-s. 1, of the Judicature (Consolidation) Act, 1925. On June 17, 1929, leave was given to amend this petition by claiming relief under s. 192 of the same Act by way of the application of property settled by a marriage settlement as well as under s. 191, sub-s. 1. On June 25, 1929, there was a consent order that the amended petition be treated as a petition under the later section.

On June 27, 1929, the petitioner by leave filed a petition for the maintenance of the children of the marriage. The registrar, to whom the petitions were referred, reported on December 24, 1929, that the settlement of December 30, 1927, was such a post-nuptial settlement as could be dealt with under s. 192, and that the restraint on anticipation imposed by the deed poll of December 7, 1928, should be discharged. The report recommended that the settlement should be varied by extinguishing all rights thereunder of the respondent as if she were dead, that subject to the rights of Barclays Bank the trustees should be directed to pay the income settled to the petitioner or the testamentary guardian to be appointed by him for the maintenance and advancement of the children of the dissolved marriage till they should attain the age of twenty-one, and on their attaining that age the corpus and income should be in trust for them absolutely in equal shares and that there should be no order on the petition for maintenance.

Counter-notices of motion were given by the petitioner to confirm the report and alternatively that the respondent be ordered to execute a settlement of her property for the benefit of the petitioner and the children or either of them, and by the respondent to set aside the report.

Bayford K.C. (*R. Bush James* with him) for the petitioner. The settlement is within the purview of s. 192. The deed refers to the respondent herself, her husband and her children. That makes it a marriage settlement, though the co-respondent is now her husband. Alternatively for the purposes of s. 191 the restraint on anticipation is immaterial, because the wife in making the deed poll was dealing with property of her own. *Loraine* v. *Loraine* (1) is distinguishable. The settlement itself, as distinguished from the deed poll, satisfies the definitions in *Worsley* v. *Worsley* (2) and *Prinsep* v. *Prinsep*. (3)

A. Grant K.C. (*H. W. Barnard* with him) for the respondent. We do not suggest that this instrument is not a settlement, but we say that it is not a post-nuptial settlement. There is no reference in it to the only marriage as to which it could be called post-nuptial. From the evidence of the dates the first marriage could not have been in the contemplation of the settlor. The object was no doubt to defeat the first husband. The deed does not satisfy any of the tests applied in *Prinsep* v. *Prinsep.* (1) The respondent is not referred to as " wife," but merely as the settlor, and the continuance of the married state is not contemplated.

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(1) [1912] P. 222.

(2) (1869) L. R. 1 P. & M. 648.

(3) [1929] P. 225, 232.

The settlement does not come within s. 192, and apart from that section the Court has no power to relax a restraint on anticipation.

J. M. Gover K.C. (*Hon. Victor Russell* with him) for the trustees and Barclays Bank. The settlement on the face of it is not " made on the parties whose marriage is the subject of the decree," and therefore is not within the section. The settlement is made upon the petitioner and the present husband does not fulfil the description of a party whose marriage is the subject of the decree. The settlement is, as it were, one made by an unmarried woman about to marry a second husband at the date of the settlement and is exactly within the mischief of the decision in *Hargreaves* v. *Hargreaves.* (2)

The only possible remedy for the petitioner is under s. 191.

Bayford K.C. in reply. *Prinsep* v. *Prinsep* (1) lays down that there is no materiality in form so long as the financial benefit of one or the other of the spouses is intended. " Parties " within the section includes a party. If the argument on the other side holds good, directly there is a fund in trust although in trust for the settlor and children the property escapes the jurisdiction.

Cur. adv. vult.

Jan. 27. BATESON J. The question I have to determine is whether the settlement dated December 30, 1927, is a post-nuptial settlement made on the parties whose marriage is the subject of the decree within the terms of s. 192 of the

(1) [1929] P. 225, 232.

(2) [1926] P. 42.

Judicature Act, 1925. It is contended that it is neither nuptial nor made on the parties. I agree. In my judgment it is not a post-nuptial settlement within the meaning of that section.

The material dates are these. On May 26, 1927, the husband filed a petition for divorce against his wife and the co-respondent. At that date, the wife was entitled to certain funds: (1.) Under her parents' settlement on her mother's death absolutely; (2.) Under her grandfather's will also on her mother's death absolutely; (3.) Under a voluntary settlement made by her parents on her mother's death to a small life interest without power of anticipation, and (4.) Under her father's will to a life interest in a much larger sum also without power of anticipation. In the summer of 1927, as I was told, the petitioner was informed that his wife and the co-respondent would not defend the suit, and in November 16 of that year the case was set down as undefended. On December 30, 1927, the settlement in question was made whereby the wife settled her interest under the grandfather's will and parent's settlement on herself for life and remainder to any children with power to appoint a life interest to any husband. The settlement recites that it is made between "Irene Melvill . . . . wife of Lieutenant-Colonel James Lister Melvill (hereinafter called the 'settlor') of the one part and Irene Mary Diana Simmons, widow" (that was her mother) "and Francis Covell . . . . solicitor" (he was her solicitor) "of the other part." She is described there as the wife of Lieutenant-Colonel Melvill, as, in fact, she was at that time. It recites the funds in which she has absolute interest on her mother's death. It recites also the parents' marriage settlement, and recites then that she had issue two children and no more, a boy and girl, who were the children of the marriage. It goes on to say: "Now this deed made in consideration of the natural love and affection of the settlor for the said" two children "witnesseth as follows," and then she settles the grandfather's fund and the parents' settlement fund on herself for life. Clause 3 says: "The trustees shall pay the income of the said respective trust premises and the property for the time being representing the sum (hereinafter called 'the trust fund') to the settlor during her life. (4.) After the death of the settlor the trustees shall stand possessed of the capital and future income of the Trust Funds in trust for all or any of the children or child of the settlor who being male attains the age of 21 years and so on." So the settlement is not on the two children of the marriage in question in the suit but on "all or any of the children." Clause 5 gives her power in default of children surviving to appoint by will. Clause 6, para. 1, says: "The settlor may by will or codicil appoint that the income or any part not exceeding a moiety of the trust fund shall from and after the death of the settlor be paid to any husband who may survive her during her life or any less period in such manner and subject to such conditions and restrictions as the settlor may think fit." Then there are the other usual clauses.

At the time that settlement was made the suit for divorce was in progress and it was well known that the husband, of course, might come to the Court after the decree was made under ss. 191 and 192 of the Judicature (Consolidation) Act, 1925, if there were any funds at the disposal of the wife, and I am satisfied that the settlement was made by the wife in order to protect, if she could, any money she might become entitled, or to which she was entitled, from being touched in any way by her husband.

On March 26, 1928, the decree nisi was pronounced and on October 22, 1928, the decree absolute was made. On November 2 of the same year the mother died, so that the wife became absolutely entitled to the funds covered by the settlement of December 30, 1927. On November 6, 1928, the husband filed his petition under s. 191 of the Judicature (Consolidation) Act, 1925. That section is a section which gives the Court, if it thinks fit, power to order a settlement to be made of property or any part thereof of the wife for the benefit of the innocent party and the children. On November 29, 1928, the wife assigned to Barclays Bank the income of the funds under her father's will and also under the settlement of December 30. The assignment was to secure an overdraft. On December 7, 1928, there was a deed poll made by the wife restraining her anticipation of her income under the settlement of December 30, 1927. It is a deed supplemental to that settlement and is so stated. On December 12, 1928, the wife married the co-respondent. On June 17, 1929, leave was given to amend the petition under s. 191 so as to bring in s. 192, and on June 25, an order was made to treat that petition as for one variation of settlement under s. 192. On June 27 there was also filed by the petitioner a petition for maintenance of the children of the marriage. Sect. 192 says : " The Court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the Court thinks fit, and the Court may exercise the powers conferred by this sub-section notwithstanding that there are no children of the marriage."

I might add that the wife's total income appears to be something between 4000*l.* and 5000*l.* and the husband's income is something like 1700*l.*, reducible to 1300*l.* when he retires.

Counsel for the petitioner says that the settlement is a post-nuptial settlement and made on the parties. He says that if it is made on one party, that is sufficient, and that it is post-nuptial if it is made after the marriage, as indeed this was : and that it is a post-nuptial settlement within s. 192, because the respondent is described as the wife of the petitioner and she has power to appoint to her husband, and the only husband she had at the time was the petitioner. He cited to me the cases of *Loraine* v. *Loraine* (1) ; *Worsley* v. *Worsley* (2) ; and *Prinsep* v. *Prinsep*. (3)

Counsel for the respondent says that it is not a post-nuptial settlement at all ; there is no reference to marriage in it. The parties were on the eve of a divorce and the object was to defeat the husband getting any control of his wife's funds. He relies on the test Hill J. applied in *Prinsep* v. *Prinsep* (1), and he says that it fails to stand that test.

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(1) [1912] P. 222.
(2) L. R. 1 P. & M. 648, 651.
(3) [1929] P. 225.

Counsel for the trustees says that the settlement is not made on the parties and does not come under the section, it is a settlement by one of the parties, not on them, and not on spouses in relation to each other; and he cited in addition the case of *Hargreaves* v. *Hargreaves*. (2)

In *Worsley* v. *Worsley* (3) the Judge Ordinary says this: "The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the Legislature by this section has armed the Court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife. The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife." The point of that decision seems to me that the property must be settled upon her in her character as a wife, and in this case it really was not settled upon her in her character as a wife under the marriage which she had made with the petitioner. In *Prinsep* v. *Prinsep* (4) Hill J. says: "The main point in issue is whether the settlement of August 25, 1920, is a 'post-nuptial settlement on the parties' within the meaning of s. 192 of the Judicature Act, 1925. Is it upon the husband in the character of husband, or upon (5) the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular

(1) [1929] P. 225.

(2) [1926] P. 42.

(3) L. R. 1 P. & M. 648, 651.

(4) [1929] P. 225, 232.

(5) The report reads "in" by a manifest error.

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form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state." It is that part of the judgment under which the settlement in this case fails to come. It is not a settlement on a spouse as spouse and with reference to the married state.

Counsel for the petitioner drew my attention to the passage in *Loraine* v. *Loraine* (1), where Cozens-Hardy M.R., in dealing with that case, which was a case of property coming under the will of the father of one of the parties with a restraint on anticipation—quite a different case to this—said: " We are really asked . . . . there is no disguising the matter . . . . by the petitioner in this case to alter and interfere with that which is not the creation of the married woman herself, but is a part of the will of her father, under which will, unaltered and untouched, she must take, and alone can take, the interest now in question," and he relied upon the words " that which is not the creation of the married woman herself." But that question as to whether it is the creation of the woman herself to my mind has nothing to do with the words of s. 192, which did not say anything about a settlement created by the woman herself, or by the man himself. It is merely descriptive in that case of the facts with regard to the settlement in that case. The words themselves in the section do not say any settlement, they are limited to the particular class of settlement mentioned therein. They must be post-nuptial or ante-nuptial and they must be made on the parties. In *Hargreaves* v. *Hargreaves* (2) the question was with regard to an ante-nuptial settlement, and a similar sort of settlement to the one in this case, but made before marriage, was held not to be an ante-nuptial settlement. Hill J. in that case says that the argument comes to this. "Any settlement inter vivos made upon either of two people who at any subsequent date marry is a settlement which the Court can deal with under the section" (of course, if the section had wanted to do so it could very easily have done it) "because it is ante-nuptial and any property dealt with by such a settlement is to be regarded as property settled. In my view that cannot be. This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement, that is, a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children." Again applying that test, it seems to me that this settlement does not satisfy it.

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(1) [1912] P. 222, 229.

(2) [1926] P. 42, 44.

In my judgment it is not a settlement on the wife in her character as a wife, nor is it in reference to the married state of the spouses. It is a settlement upon the wife for herself and for any children she may have in future and with power to appoint to any husband she may take, made at a time when she knew perfectly well that the only possible person that she at that time could think of benefiting would not be the husband who had not yet got his decree absolute, but the new husband whom she intended to take as soon as she possibly could. On these grounds I think that this report cannot stand.

Set aside report and dismiss petition so far as it asks for variation of a settlement under s. 192. *Wife's costs. Trustees' costs of petition and motion. Petitioner may add those costs to those payable by co-respondent. Leave to appeal.* (1)

Solicitors for the petitioner: *Guedalla, Jacobson & Spyer.*

Solicitors for the respondent, the trustees, and Barclays Bank: *Withers, Bensons, Currie, Williams & Co.*

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(1) Appeal allowed in C. A. [1930] W. N. 93.

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THE OTRANTO.

Shipping—Collision—Vessels on crossing Courses—Duties of "keep course and speed" Vessel—Regulations for Preventing Collisions at Sea, 1910, *arts.* 19, 21, *and note thereto, and* 27.

By art. 19 of the Collision Regulations, "where two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other," which (under art. 21) "shall keep her course and speed"; but by the note to art. 21 "when in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving way vessel alone, she [the stand-on vessel] also shall take such action as will best aid to avert collision."

By art. 27, "in obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Two steam vessels, the *K. M.* and the *O.*, were approaching each other on crossing courses of nearly a right angle at a joint speed of nearly 30 knots. The *O.*, the stand-on vessel, had the *K. M.* broad on the port bow at a distance of several miles. As the bearing of the *K. M.* did not alter, the *O.*, when the vessels were under three-quarters of a mile apart, hard-a-starboarded to pass under the stern of the *K. M.* and sounded two short blasts. Twenty or thirty seconds afterwards the *K. M.* hard-a-ported and sounded one short blast, and the two vessels came into collision less than three minutes after the alteration of course by the *O.*

Hill J. held the *K. M.* to blame for giving way too late, for hard-a-porting, and for not going astern as soon as the *O.* sounded two short blasts and was seen to be swinging to port. He also held that although mathematically, on the turning circle of the *K. M.*, that vessel by porting when she did could by her own unaided action have avoided the collision, the time had come when, as a matter of seamanship, the master of the *O.* was entitled to act under the note to art. 21, but that he was to blame for starboarding and for failing to follow "the golden rule" of taking off way. His Lordship accordingly held both vessels to blame in equal degrees. The owners of the *O.* appealed.

The Court by a majority (Scrutton L.J. dissenting) allowed the appeal:—

Held (per Lawrence and Greer L.JJ.), after a full review of the authorities, that some margin of time in taking action must be allowed to the stand-on vessel under the note to art. 21, and under art. 27, before, as well as after, the last moment at which it is possible for the give-way vessel by her own unaided action to avoid collision, and that the master of the *O.* was justified in acting when he did; that the Court cannot lay down a rule prescribing the particular action to be taken by a stand-on vessel, and hold that any action other than taking off way is prima facie evidence of negligence; that the onus of proving that the action taken by the *O.* was negligent rested on the *K. M.*: that the master of the *O.* was not to blame for starboarding and keeping his speed; that the proximate cause of the collision was the porting of the *K. M.* after the *O.* had signalled that she (the *O.*) was starboarding; and that the *K. M.* was alone to blame.

Per Scrutton L.J. As the *K. M.* could by her own unaided action have avoided the collision at the time she ported, it was doubtful on the authorities if the time had come when the *O.* was justified in acting, but that in any event the *O.* was to blame for starboarding and not taking off her way.

APPEAL from a decision of Hill J. in an action of damage by collision.

The collision took place in the North Sea some miles out from the mouth of the Humber on August 11, 1928, in fine clear weather shortly after sunset. The vessels concerned were the *Kitano Maru*, a twin screw steamship of 7952 tons gross belonging to the plaintiffs, and the *Otranto*, a twin screw turbine steamship of 20,032 tons gross belonging to the defendants, the Orient Steam Navigation Company.

The facts, which are fully set out in the judgments, very shortly stated, were as follows:—

The *Kitano Maru* was bound south from Middlesbrough to Antwerp, part laden with cargo, and manned by a crew of 152 hands. She was making about 13 knots. The *Otranto* was bound east from the Humber for a Norwegian cruise with 562 passengers and a crew of 368 hands. She was making about 16 knots. The vessels were on crossing courses, and each sighted the other at a distance of about seven miles. The *Kitano Maru*, having the *Otranto* on her starboard bow, was the give-way vessel under art. 19 of the Collision Regulations.

The *Otranto* kept her course and speed and the vessels continued to approach, the bearing of the *Kitano Maru* remaining unaltered about 3½ points on the *Otranto's* port bow. When it was seen that the *Kitano Maru* was taking no measures to keep out of the way the master of the *Otranto*, when the vessels were " at the outside three-quarters of a mile apart and probably less," hard-a-starboarded and sounded two short blasts. Half a minute afterwards or a little less the *Kitano Maru* hard-a-ported and sounded one short blast, and within three minutes after the alteration of course by the

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Otranto the vessels came into collision, the stern of the *Otranto* striking the port bow of the *Kitano Maru*. Very shortly before the vessels struck both had put their engines full speed astern.

Hill J. held that the *Kitano Maru* acted much too late and "was very badly navigated"; but he also held the *Otranto* to blame in equal degrees because, although the time had come when, as the *Kitano Maru* showed no signs of altering course, the master of the *Otranto* was entitled to act, he starboarded instead of following "the golden rule" of taking off his way.

The owners of the *Otranto* appealed, and the owners of the *Kitano Maru* entered a cross-appeal, but at the hearing the cross-appeal was abandoned.

A. T. Miller K.C. and *Dumas* for the appellants.

C. R. Dunlop K.C. and *R. F. Hayward* for the respondents. The arguments and the authorities relied on (except those on the question of apportionment of damages, which in view of the decision of the Court are immaterial) are fully set out in the judgments. In addition to the cases therein cited counsel for the respondents referred to *The Député Josselin de Rohan* (1) and *The Mendocino*. (2)

The assessors in both Courts were of opinion that as a reasonably prudent navigator the master of the *Otranto* was justified in acting when he did, but they differed as to the action taken. The Elder Brethren were of opinion that the *Otranto* was wrong in starboarding; the assessors in the Court of Appeal were of opinion that the hard-a-starboarding without decreasing speed was good seamanship, the master's reason, as stated in his evidence, being that if he had taken off his way instead of altering course the *Kitano Maru*, if she had maintained her course, would have struck the *Otranto* amidships, and porting by the *Otranto* would have opened up the whole of her port side to the *Kitano Maru*.

Cur. adv. vult.

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(1) (1923) 17 Ll. L. R. 107.

(2) (1921) 6 Ll. L. R. 519.

1930. Jan. 27. The following judgments were read :—

SCRUTTON L.J. This appeal raises again the perplexing problem of the give-way ship which seems likely not to give way, but in fact does give way, and the stand-on ship which in consequence does not stand-on, with the resultant collision.

The *Otranto*, a large Orient liner, 658 feet long, was starting from the Humber on a pleasure cruise to Norway, and was a little before 8.45 P.M. on August 11, 1928, proceeding at 16 knots on a course N. 59 E. True. The *Kitano Maru*, a large Japanese steamer, 474 feet long, was proceeding from Middlesbrough to Antwerp, partly laden, on a course S. 40 E. True. The courses were crossing courses at nearly a right angle ; the Japanese vessel was the give-way ship, and the Orient liner the stand-on ship.

The two ships came into collision, the *Otranto* striking the port bow of the Japanese ship a right-angled blow. The judge finds that each ship had altered about eight points from her course, the *Otranto* having starboarded, the *Kitano Maru* having ported.

The Japanese vessel came into Court with an impossible story of porting when three miles off, and, after an interval, hard-a-porting. It became clear that if this story were true the two ships would never have got near each other, and the judge rejects it as a concocted invented story. He accepts the story of those on board the *Otranto*, which is, that the *Kitano Maru*, seen seven miles off, was carefully watched, her bearing never altering, 3½ points on the *Otranto's* port bow, till she was under three-quarters of a mile distant, the point of intersection of the then courses being about half a mile from the *Kitano Maru*, and a little more from the *Otranto*, and, as the *Kitano Maru* showed no sign of giving way, that the captain of the *Otranto* then decided that he must act, at a time about three minutes before the actual collision, and that he then hard-a-starboarded and blew two blasts. Very shortly afterwards, within twenty or thirty seconds, that is to say two and a half minutes before the collision, he saw the Japanese vessel porting and heard her blow one blast. The *Otranto* gave the order hard-a-port, but altered it almost directly before the helm had got amidships to hard-a-starboard, and the two ships came into collision at right angles, the *Otranto's* stem striking the port bow of the *Kitano Maru*, each of the headings having altered about eight points, or a right angle. Each vessel went astern shortly before the collision.

The trial judge, with the concurrence of the Trinity Masters, has condemned the *Kitano Maru* for giving way too late, for hard-a-porting, and not going astern when the *Otranto* blew her whistle. As to the *Otranto*, he has found, again with the concurrence of the Trinity Masters, that, not mathematically, but as a matter of practical seamanship, a distinction I will refer to later, the time had come when the *Otranto* was entitled to act, but that she took the wrong action in starboarding, as he and the higher Courts had frequently decided; she should have "followed the golden rule," to take off her way and keep her course. He therefore found the *Otranto* to blame, and, being unable to distinguish the blame, found each ship equally to blame.

The *Otranto* appeals, contending (1.) that she was not to blame at all; (2.) that if to blame, the greater proportion of blame was on the *Kitano Maru*. The latter vessel originally appealed, but abandoned her appeal, which was hopeless. She was obviously keeping a bad lookout, and only awoke to danger when the *Otranto* blew her two blasts.

The rules which apply, which seamen navigating ships have by statute to obey unless they can find sufficient excuse, are rr. 19, 21, and 22. I summarized them in *The Orduna* (1) thus: "There are three rules concerned when two steam vessels are crossing so as to involve the risk of collision; the vessel which has the other on her own starboard side should keep out of the way; where one of two vessels is to keep out of the way, the other should keep her course and speed; and every vessel which is directed by the rules to keep out of the way of another vessel should, if the circumstances admit, avoid crossing ahead of the other.

(1) [1919] P. 381, 392.

I entirely agree, and wish to emphasize, if it were necessary, the importance of these rules being strictly observed. The position of ships crossing with a risk of collision is a difficult one. It has been thought right to tell one of the ships to keep her course and speed and the other ship to keep out of the way. The give-way ship can act with much greater certainty if she knows that the stand-on ship is going to do exactly what she is doing when seen. If the stand-on ship acts too soon she may easily put the give-way ship in a great difficulty; and, hard as it is, she ought to keep her course and speed until the last possible moment." I add to that summary the note to r. 21: "When in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she" [the stand-on ship] "also shall take such action as will best aid to avert collision." Those rules are to be applied strictly. Atkin L.J. in *The Ulrikka* (1) says: "I desire to say as has already been said over and over again here and in the Admiralty Court, that it is of extreme importance strictly to maintain the enforcement of arts. 19 and 21. These two rules are a bright light to navigators; and I suppose day by day and hour by hour they operate to prevent collisions at sea. It appears to me of the highest importance to enforce them and enforce them strictly. In doing that, one does not differ from the views expressed that in the stress of collision there is a margin which may be allowed to navigators. But that margin is a very narrow one"; and if the note to art. 21 is applied strictly, the excuse for the stand-on ship's not keeping its course does not begin to operate till the give-way ship cannot avoid a collision by any action of its own if the stand-on ship keeps its course and speed.

Now, in the present case, when the stand-on ship acted otherwise than by keeping her course and speed, the give-way ship was still 3½ points on the port bow of the stand-on ship; the intersecting courses were such that the give-way ship was over half a mile, say 2600 feet, from the point of intersection if the stand-on ship kept her course and speed and nearly three-quarters of a mile from the stand-on ship; the turning circle of the give-way ship hard-a-porting, even without any assistance from reversing her starboard engine, was such that in 900 feet radius she would have completed a quadrant of her circle, that is to say that she would have only have got 900 feet nearer the stand-on ship's course, originally 2600 feet distant from its starting point; and that in the three minutes which elapsed between the stand-on ship's taking action and the collision, the two ships had altered their heading eight points each and collided with a right angled blow. The stand-on ship hard-a-starboarded three minutes before the collision, blowing the appropriate blast, and twenty to thirty seconds later the give-way ship hard-a-ported blowing the appropriate blast. Under those circumstances, it occurred to me, before we consulted the assessors, that both when the stand-on ship acted and when the give-way ship acted, collision could in fact have been averted by the action of the give-way ship alone. We asked our assessors two questions: (1.) "Assuming the *Otranto* had not altered her course and speed, would the action of the *Kitano Maru* taken two and a half minutes before the collision have avoided collision?" They answered to that, "Yes." Then we also asked (2.) "Assuming the *Otranto* had altered speed but not course, would the action of the *Kitano Maru* taken two and a half minutes before the collision have avoided collision?" They answered, "Yes, assuming the *Otranto* to be on the original track." Counsel for the stand-on ship, after consultation, also agreed that, as a matter of fact, not of judgment at the time, they could not dispute this. We have then that the *Otranto* acted at a time when collision could have been avoided by the action of the give-way ship alone, because she erroneously thought that the give-way ship could not then avoid the collision by her own action, when in fact the give-way ship could then avoid the collision by her own action, and did take action which would have avoided the collision if the stand-on ship had kept her course and speed.

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(1) (1922) 13 Ll. L. R. 367, 368.

But a difficult question then arises on which there have been different opinions since and perhaps before. Brett L.J. in *Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Co.* (*The Voorwaarts; The Khedive*) (1) asked the assessors: "If this order which he gave was not absolutely right under the circumstances, was it such an order as a captain of ordinary care, skill, and nerve might be fairly, as a seaman, excused for giving under the circumstances in which the captain was placed?" and, the assessors having answered in the affirmative, freed the *Khedive* from blame, only to be reversed by the House of Lords. Lord Blackburn gave an account of the statutory legislation up to that time. (2) The Court of Appeal had then to consider the subject again in *The Benares* (3), where Bowen L.J. said: "As to the law, *The Khedive* (1) decided that it was no answer when the rules had been infringed to say that a master had acted from the best of motives and according to the best of his ideas, for the law says, not that the master is to do what he believes to be best, but that the regulations are to be obeyed." The Court then held that the joint effect of all the regulations had not been disobeyed. In *The Memnon* (4), where the stand-on vessel did not stop and reverse, there being risk of collision, the House of Lords, while commenting unfavourably on the language of the Court of Appeal, held the master to blame for not stopping and reversing. The effect of this was that in 1897, by a change in the regulation, the stand-on vessel was required to keep her speed as well as her course till the moment when collision could not be avoided by the action of the give-way ship alone; that is to say the obligation of the stand-on ship was made stricter. She was not to alter her speed merely because there was risk of collision with the give-way ship. In 1894 the statutory obligation to obey the regulations was repeated (see Merchant Shipping Act, 1894, s. 419), as was the presumption of fault if the regulations were broken. In 1911, by the Maritime Conventions Act, the latter presumption was repealed, the statutory obligation remaining, but the owner was only liable if the fault of his servants, e.g. the breach of regulations, caused the collision. The question what happened if the master in fact broke the regulations but reasonably thought he was taking the seamanlike course in so doing still remained.

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(1) (1880) 5 App. Cas. 876, 877.

(2) 5 App. Cas. 892–894.

(3) (1883) 9 P. D. 16, 18.

(4) (1889) 6 Asp. M. L. C. 488.

In *The Olympic and H.M.S. Hawke* (1), a case, if the rules applied, of a crossing stand-on ship where the give-way ship was proceeding in the same direction, it having been argued that the stand-on ship should have altered her course because there was risk of the give-way ship not doing so, Vaughan Williams L.J. said: "It seems uncertain on the cases whether the exception to the rule only arises when a collision is inevitable unless averted by the ship which has to keep her course and speed, or whether the exception applies when the collision is so probable that good seamanship, if there were no rule, would justify action by the ship, bound to keep her course, to avert collision." And Lord Parker said: "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger. If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and speed. I accept Captain Blunt's evidence that he ported as soon as the Old Castle Buoy was clear, because he felt uncomfortable at the close proximity of the *Olympic*, and I think under the circumstances he was justified in so doing, though the cases are not quite consistent on the point. At any rate, it is I think quite impossible to suggest that the *Hawke's* action in porting was, apart from the rules, in any way a breach of good seamanship or in any way contributed to the causes of the collision." The *Hawke*, being a King's ship, was apart from the rules.

In *The Orduna* (2), to the facts of which I refer later, Bankes L.J. commented on the language of Lord Parker in

(1) [1913] P. 214, 245, 279.

(2) [1919] P. 381.

The Hawke (1) and said it might have to be reconsidered; that there might be cases where the stand-on ship might act when she was misled by the other ship, but that it was important that the rules should be strictly observed, and that any such excuse must be scrutinized with the very greatest care. Lord Phillimore, in *The Karamea* (2), declined to express an opinion. He said: "It might be thought as a matter of law that all that the ship which has to get out of the way has to do is to take just sufficiently effective steps in just sufficient time, and it might be thought that she so doing ought not to be found to blame, even if the insufficiency and delay of the proper manœuvre has puzzled the other ship and led her to do something which she should not. I pronounce no opinion."

Hill J. in the present case took the view apparently taken by the two judges in *The Hawke*. (1) He said: "Mr. Dunlop argued that he [the master of the *Otranto*] acted before he was called upon to act at all under the rule. I do not think so. I have asked the Elder Brethren about that as a matter of seamanship, having regard to the terms of the rule, and they agree with me that the time had come when he was called upon to do something. The rule must be interpreted, not mathematically but reasonably, with regard to the position as it presented itself to the commander of the *Otranto*. It may be, now we have worked out everything—the turning circles, the precise distances, the precise courses and all the rest of it—it may be that it can be shown that starboarding about three minutes before the collision was starboarding at a time when, mathematically, it was possible for the *Kitano Maru* by her own unaided action to avoid the collision. It may be so, and in that sense the time had not arrived which entitled the master of the *Otranto* to act. But that is not the way we must look at it. Looking at it all round, was the man as a seaman, entitled to say to himself, as a reasonably prudent man 'has the time come when I cannot avoid acting?' I think that time had come and that he was entitled to act. I cannot therefore say that he acted

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(1) [1913] P. 214.

(2) [1922] 1 A. C. 68, 79.

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too soon." The Trinity Masters agreed with him, and our assessors take the same view. We asked them: "Given the pleaded courses and speeds and the vessels approaching on bearings which do not change, and assuming that the *Kitano Maru*, the give-way ship, did not act until after the *Otranto*, at a time of about three minutes before the collision and a distance of under three-quarters of a mile, had hard-a-starboarded and blown two blasts, (1.) had the time come when as a matter of good seamanship the *Otranto* might reasonably believe that collision could not be averted by the action of the *Kitano Maru* alone?"; and they answer: "Submitted—assuming the question refers to the moment before *Kitano Maru* had altered course or sounded any helm signal and the *Otranto* had sounded two blasts—we think that (1.) the master was justified in taking action to avoid risk of collision."

I confess I have the gravest doubt about the correctness of this view. I take Hill J.'s distinction between "mathematically" and "reasonably" to mean that though in fact it is seen afterwards that the give-way ship could and would by her own action have avoided the collision if the stand-on ship had kept its course, yet if the stand-on ship might reasonably think that the give-way ship was not going to act, the stand-on ship might alter her course or speed. This is I think contrary to Dr. Lushington's view as expressed in *The Test* (1), where he says: "I cannot conceive that anything would be more likely to lead to mischievous consequences, than to suppose that a vessel, whose duty it is to keep her course, should anticipate that another vessel will not give way, and so give way herself. The consequence would be, that there would be no certainty; whereas, the doctrine I have upheld," supported by the nautical assessors' authority, "is, that, in cases of this description, you ought always to follow the general rule. The certainty which results from an adherence to general rules is, in my opinion, absolutely essential to the safety of navigation." And it appears to me to extend the language of the rule from "shall

(1) (1847) 5 N. of C. 276, 278.

act when collision cannot be avoided by the action of the give-way ship alone," to "when the captain thinks reasonably but wrongly that it cannot be avoided by the action of the give-way ship alone."

Further, I think, such a view of the facts in the present case is inconsistent with the view taken by the House of Lords in the cases where the give-way ship held on till she was ahead of the stand-on ship, and would, if she continued her course, pass clear to port, but then ported. One of such cases is *The Norman Monarch.* (1) Another, and a very striking case, is *The Orduna.* (2) In that case the give-way ship, the *Konakry*, on a course seventeen degrees different from that of the stand-on ship, the *Orduna*, kept on her course till she was ahead of the latter and a quarter of a mile off. The *Orduna*, thinking the *Konakry* was going to cross ahead, starboarded to give her room, but at the same time the *Konakry* ported and would have gone clear astern of the *Orduna* but for the *Orduna's* starboarding. The *Orduna* was held to blame by all six assessors, by the Court of Appeal and by the House of Lords. It is said that was because the *Orduna* said it was clear that there was no risk of collision because the *Konakry* was going to pass ahead. But it is startling that where a give-way ship has got so far in her crossing course that she is ahead of the stand-on ship, and the latter thinks the give-way ship is certain to go clear, the stand-on ship should be condemned for starboarding; but that when the give-way ship is three and a half points on the port bow and half a mile from the intersecting lines of the original courses, and the stand-on ship is merely doubtful what the give-way ship is going to do, she should be excused. Similarly in *The Athena* (3), where the give-way ship got right ahead of the stand-on ship and then ported, and continued to port though the stand-on ship blew a starboard helm whistle, the stand-on ship was held to blame as having acted too early, and Lord Sumner explained that there was nothing new in the judgments in the House of Lords in *The Orduna* (2),

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(1) (1918) Lloyd's List, Dec. 10.

(2) [1921] 1 A. C. 250.

(3) (1923) 14 Ll. L. R. 515.

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but merely the old and correct interpretation of the crossing rule. A similar view was taken by this Court in *The Ulrikka* (1), when the stand-on ship acted when the give-way ship was one and a half to two points on the port bow of the stand-on ship and showing no signs of giving way, and the stand-on ship was held to blame for starboarding. Decisions of the House of Lords on fact are not strictly binding on this Court, but when the House of Lords has three times held that a particular set of facts—the give-way ship practically ahead and showing no signs of giving way—does not justify the stand-on ship in altering course, I think it would not be becoming in the Court of Appeal to hold that a set of facts much less favourable to the stand-on ship, that is the give-way ship well on the port bow and at such a distance that she can in fact avoid the collision by passing astern of the stand-on ship, excuses the stand-on ship for altering course.

My judgment in *The Orduna* (2) I hope shows that I appreciate the difficulties of the stand-on ship, but in view of the authorities, and treating the assessors as witnesses, as I am told to do in *The Australia* (3), and paying due respect to the experience of Hill J., I should have great difficulty in accepting his conclusion that the stand-on ship was justified in not keeping her course and speed. But I have no difficulty in accepting his conclusion, with the concurrence of his assessors, that the stand-on ship was not justified in starboarding. Our assessors took an opposite view to the judge and the assessors below on this point. We asked them [Question B], reciting the previous facts I have already read, "If so, was hard-a-starboarding, without reversing engines, good seamanship under the circumstances?" and they replied "that hard-a-starboarding, without decreasing speed, was good seamanship." We are, therefore, in the position discussed in *The Australia* (3), and have to form our own opinion on the conflicting evidence.

I agree with the view taken by Hill J. and the Trinity Masters. The give-way ship, if she obeys the rule, is to port

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(1) 13 Ll. L. R. 367.
(2) [1919] P. 381, 393.
(3) [1927] A. C. 145.

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and pass under the stern of the stand-on ship. In the present case she acted in time to do this, and would have avoided the collision by her own action alone, if the stand-on ship had kept her course and speed. For the stand-on ship to starboard is to go into the water which the give-way ship will be traversing, if she obeys the rule. This seems to me, as it did to Hill J., the worst thing the stand-on ship can do, and I agree with him that the action the stand-on ship should take generally is to slacken speed, giving more time to the give-way ship to take action to obey the rule. Starboarding to a ship ahead was condemned in the three House of Lords decisions I have mentioned. It was condemned by this Court in *The Ulrikka* (1), where the give-way ship was one and a half to two points on the port bow, showing a green light, the courses about thirty degrees apart and the ships 600 yards apart. It has been repeatedly condemned by the judge below (see *The George Washington* (2) and *The Mathilda* (3)), in which latter case Hill J. said: "It is the plaintiffs' case, which I accept, that the *Mathilda* ported very late, but it is plaintiffs' pleaded case that when the *Landport* hard-a-starboarded the *Mathilda's* bow was still on the *Landport's* port bow. I have not to consider whether starboarding would have been justified if the *Landport* had starboarded after the *Mathilda* had crossed to starboard of the *Landport*. The master of the *Landport* was put into a position of great difficulty by the *Mathilda's* failure to give way and open her red. But so is every stand-on ship when the give-way ship is apparently taking no action; and in such cases, when ships are on crossing courses, if the time for action by the stand-on ship has come, the action called for is to take off way. To take helm action at the same time may or may not be justified, according to the circumstances of the ease. In my own view, it is in general not justified in a crossing course, but to take helm action without engine action is certainly wrong. If the give-way ship does act, though too late, then the stand-on ship by starboarding defeats that action. If the give-way ship persists in crossing ahead, the stand-on ship by reversing gives the give-way ship more time to get across. One always sympathises with the man in charge of a stand-on ship, who is bound to keep his course and speed up to a point, and must then act so as best to avoid a collision; but starboarding without reversing is to take the worst possible action." I entirely agree with this. In my view, to hold that a stand-on ship may starboard, when she does not know what a give-way ship on her port bow is going to do, and when the distances are such that the give-way ship, by her own action, can in fact, by porting, avoid the collision, though the stand-on ship, by error of judgment, thinks she cannot, will create hopeless confusion at sea.

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(1) 13 Ll. L. R. 367.

(2) (1923) 17 Ll. L. R. 301.

(3) (1926) 25 Ll. L. R. 14, 16.

I do not think the case is made any better by the stand-on ship's signalling "I am going to break the rule by starboarding." The only case I have found, in which starboarding by the stand-on ship has been excused, is *The Rayford* (1), in which the Court of Appeal took the view that the starboarding was so slight it did not affect the collision. My judgment in that case shows, I hope, that I appreciate the difficulties of the stand-on ship and am desirous of helping her, if I can. But I think the remedy is altering the rule by legislation, not whittling it away by judicial decision. I, therefore, agree with the learned judge below that the *Otranto* was to blame for not keeping her course.

It was, however, argued that we should vary the apportionment by the judge below, who had found equal proportions of blame. I think the effect of the decisions in *The Peter Benoit* (2) and *The Karamea* (3) is that the superior Courts will not alter the apportionment of the trial judge, unless they disagree with him on a question of fact or law substantially affecting the result. In the present case, the only difference I have with the learned judge is that I doubt his view that the *Otranto*, though mistaken mathematically in thinking that the collision could not be avoided by the give-way ship alone, was justified as a matter of seamanship in not keeping

(1) (1922) 10 Ll. L. R. 743.
(2) (1915) 13 Asp. M. L. C. 203.
(3) [1921] P. 76; [1922] 1 A. C. 68.

course and speed. This difference is against the *Otranto* rather than in her favour. I am unable, therefore, to alter the apportionment.

I shall be delighted if this case gives an opportunity to the House of Lords to give clearer guidance to the crossing ships as to their respective duties. But in this case, on the view I take, the appeal should be dismissed. As, however, my brothers do not take this view, judgment must be entered as proposed by them.

LAWRENCE L.J. Hill J. has held " both to blame " for the collision which took place between the *Otranto* and the *Kitano Maru* in the North Sea off the mouth of the Humber on the evening of August 11, 1928, resulting in damage to both vessels.

The *Otranto* has appealed on the ground that the learned judge was wrong in attributing any, or in the alternative as much as one-half, of the blame to her. The *Kitano Maru* served a notice of cross-appeal, but this was subsequently withdrawn, and the findings of fact in the Court below as to the negligent manner in which that vessel was navigated were not challenged in this Court.

It is common ground that the two vessels concerned were crossing vessels involving the risk of collision, and that arts. 19, 21, 22, 23 and 27 of the Regulations of 1910 contain the material directions which had to be observed by them respectively. The *Kitano Maru* was the give-way ship. She was very badly navigated, and committed breaches of arts. 19 and 23 by not keeping out of the way of the *Otranto* and by not slackening her speed or stopping or reversing on approaching the *Otranto*. The learned judge has acquitted the *Otranto* of any breach of the duty imposed on her by art. 21, as the stand-on ship, to keep her course and speed; but has held that in the position in which she found herself hard-a-starboarding was an act of negligence.

The first question to be considered is whether the learned judge was right in holding that the time had come when the *Otranto* was called upon to depart from her prima facie duty of keeping her course and speed and to take action in order to avoid collision. The answer to this question depends partly upon the construction of art. 21 and partly upon the particular facts of this case. The learned judge has held that on the true construction of art. 21 the master of the stand-on vessel is allowed some latitude in determining when the time has arrived to take action under the note. In my judgment this conclusion is right and in accordance with the authorities. It is clear, however, that the allowable margin is very narrow and that the onus of proving that action is taken within that margin rests heavily on the stand-on ship. Atkin L.J. (as he then was) in *The Ulrikka* (1), says with great force that arts. 19 and 21 are a bright light to navigators; that he supposes day by day and hour by hour they operate to prevent collisions at sea; and that it appears to him of the highest importance to enforce them strictly.

Cases such as *The Orduna* (2); *The Norman Monarch* (3); and *The Athena* (4), to which I shall have occasion to refer again later, are striking examples of the strictness with which art. 21 has been enforced by the Court. This article, when read in its proper setting, is plainly directed to the avoidance of the risk of collision as well as to the prevention of collision. The first and main direction is that the stand-on ship shall keep her course and speed, and the second direction which, although contained in the note, is framed in equally imperative language, is that the stand-on ship shall take such action as will best aid to avert collision when she finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone. The joint effect of these two directions is that the first duty of the stand-on ship is to keep her course and speed up to the point when the give-way ship is no longer able to keep out of the way; when that point is reached her second duty is to take such action as will best aid to avert collision: see *The Ranza*. (5) These directions are addressed to practical seamen and they must be construed so that they may reasonably be acted upon. The nature of the event, upon the happening of which the stand-on ship is to take action, shows that the rule cannot reasonably be construed as referring to the precise moment of time when, on a mathematical calculation, the give-way ship could in fact no longer avoid collision, which in most cases would depend in some measure upon factors then unknown to the navigator of the stand-on ship, such as, for instance, the turning circle of the give-way ship. Unless some latitude be allowed to the stand-on ship her navigator would be placed in the unreasonable position of committing a breach of one or other of the duties imposed upon him by this article unless he should happen by some lucky accident to hit off the exact mathematical moment of time when the give-way ship in fact first becomes unable to avoid collision—a matter which would not be ascertained until after the collision and after the relevant circumstances had been investigated. The following authorities in my opinion support the learned judge's construction. In *The Ranza* (1), where it was contended that the stand-on ship had kept her course and speed too long, Gorell Barnes J. says : " What is the duty of a vessel in the position of the *Gloamin* [the stand-on ship] with regard to a vessel in the position of the *Ranza ?* The *Ranza* had to keep out of the way and the *Gloamin* had to keep her course and speed, obviously, up to a certain point. It is quite impossible to be absolutely certain where that point is, mathematically speaking, but these rules "—namely, arts. 21 and 27—" have to be construed so that men may act reasonably upon them." The learned judge in that case, no doubt, had his mind directed to the margin of time which should be allowed to the stand-on ship after the moment had arrived when that ship found herself so close that collision could not be avoided by the action of the give-way ship alone, but the same reasoning applies to the margin of time which should be allowed to the stand-on ship before that point has been reached.

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(1) 13 Ll. L. R. 367, 368.

(2) [1921] 1 A. C. 250.

(3) Lloyd's List, Dec. 10, 1918.

(4) 14 Ll. L. R. 515.

(5) (1898) 79 L. J. (P.) 21*n*.

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(1) 79 L. J. (P.) 21*n*.

In *The Albano* (1) the Privy Council had to consider the Canadian regulations, which so far as material are identical with the regulations of 1910, and in the judgment of the Board (delivered by Sir Gorell Barnes) after a reference to the difficulty in which the master of a stand-on ship is placed in determining when the time has arrived for him to take action, there is the following passage: "Therefore he must keep his course and speed up to some point and then act, but the precise point must necessarily be difficult to determine and some little latitude has to be allowed to the master in determining this." In *The Hawke* (2) Vaughan Williams L.J. says: "I am inclined to think that in a case where good seamanship would assume that collision cannot be avoided by the action of the giving-way vessel alone, the case falls within the exception"—namely, the exception to the rule to keep course and speed—"even though in fact the giving-away vessel could by her own action have averted collision," and in the same case Lord Parker says: "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger. If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and speed." Bankes L.J. in *The Orduna* (3) comments on this latter statement, and observes that such a case ought to be scrutinized with the greatest care, and that a person must make it abundantly plain that he was justified in taking up the exceptional position to which Lord Parker refers, but adds that it is largely a question of seamanship. I agree with the view so expressed by Bankes L.J.

In *The Huntsman* (4) Bargrave Deane J., after referring to the difficult position in which the navigator of the stand-on ship is placed under art. 21, and stating that if the officer is carefully watching the give-way ship and endeavouring to do his best to judge when he ought to act, it ought not to

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(1) [1907] A. C. 193, 207.
(2) [1913] P. 214, 245, 279.
(3) [1919] P. 381, 390.
(4) (1911) 11 Asp. M. L. C. 606.

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be made a complaint against him that he waited too long or acted too soon, proceeds as follows: "It is difficult to determine the critical moment, and some latitude must be allowed to the officer of a stand-on ship who is clearly doing his utmost in a position of difficulty caused by bad navigation by those in charge of a giving-way ship." In *The Gulf of Suez* (1) Lord Sterndale M.R. approves of the passages which I have cited from *The Ranza* (2) and *The Huntsman*. (3) Although the cases which I have mentioned relate mainly to the duty imposed by the note to art. 21 on the stand-on ship to take action, I am of opinion that the same principle applies to any action taken by the stand-on ship in order to avoid immediate danger under art. 27. The necessity referred to in that article must, I think, be judged by good seamanship and not by a subsequent mathematical ascertainment of the exact moment of time when in fact the necessity first arose.

The next matter to be considered on this branch of the case is whether the *Otranto* has discharged the onus of proving that when she starboarded the time had arrived for her to take action, either under the note to art. 21 in order to aid to avert collision, or under art. 27 in order to avoid immediate danger. On the assumption that the master is allowed some latitude under art. 21 this question resolves itself into whether the master of the *Otranto*, when he took action, was justified as a matter of good seamanship in concluding that the *Kitano Maru* was so close as no longer to be able to avoid collision by her own action alone, and consequently that it had become his duty to take action. The learned judge, with the advice of the Elder Brethren, found as a fact that when the *Otranto* starboarded the time had come for her to take action. This finding was arrived at notwithstanding that it was demonstrated at the trial that, as a mathematical proposition, the *Kitano Maru* could have passed under the stern of the *Otranto* if she had ported when the *Otranto* starboarded, and that she could have done so whether the *Otranto* had kept her course and speed or had merely taken

(1) [1921] P. 318, 331. (2) 79 L. J. (P.) 21*n*.
(3) 11 Asp. M. L. C. 606.

off her way. As to this the learned judge remarked in the course of the trial: "That is quite obvious as a mathematical proposition, but as a practical rule of navigation it is not obvious at all," an observation with which I agree. The advice given to us by our assessors on this point agrees with the advice given by the Elder Brethren in the Court below.

To the best of my judgment, after having carefully considered the evidence and the arguments of counsel, the view taken by the learned judge and by all four assessors was right. The *Otranto* had been carefully watching the *Kitano Maru* ever since she was first sighted some seven miles away and had taken frequent bearings. She did not act until three minutes before the collision at a time when the vessels were under three-quarters of a mile apart and about half a mile from the point of intersection of their courses. Up to that time the *Kitano Maru* had not shown any signs of altering either her course or her speed—she was making slightly over 13 knots and the *Otranto* slightly over 16 knots. The courses were nearly at right angles. It was admitted by Mr. Harry Gray, who was called by the respondents, that a minute later there would have been a position of extreme danger if both vessels had kept their respective courses and speeds. This admission was based on the mathematical calculations which had been made since the collision. Accepting this opinion as correct and looking at the position from the point of view of a practical navigator, this margin does not in the circumstances seem to me to be too wide, especially considering that owing to the time of day the light was deceptive for judging distances with great accuracy. Having regard to all the circumstances and to the advice given by all four assessors, I agree with the learned judge's finding that the time had come when as a matter of good seamanship the master of the *Otranto* was justified in assuming that collision could not be averted by the action of the *Kitano Maru* alone, and consequently that he was not only entitled but was bound to take action and to exercise his best judgment to avoid the threatened collision.

There remains the question whether the learned judge was right in condemning the *Otranto*, not for infringing any express direction contained in the regulations, but because in his opinion, when the time for action had arrived, her master exhibited a want of reasonable care and skill. The onus of proving that the action then taken by the *Otranto* was negligent rests on the *Kitano Maru*. It was the latter's negligence which had placed the master of the *Otranto* in the difficult position of having to judge not only when to take action, but also what that action should be. Lord Morris, in *The Tasmania* (1), points out that when a collision is caused by the misconduct of the party complaining there should be very clear proof of contributory negligence.

Now what are the facts here ? The master of the *Otranto* was a competent and experienced navigator. For twenty years before the collision he had been in the service of the appellants as master and for two years he had been commander of the *Otranto*. His skill, care and nerve as a navigator, apart from the particular action taken in this case, were not called in question. He was summoned on to the bridge and took personal charge of the navigation of the *Otranto* at 8.39, being nine minutes before the collision. From that time forward he carefully watched the *Kitano Maru*. At 8.45 he came to the conclusion that the moment had arrived when it was his duty to take action, and he then gave the order "starboard 15" followed immediately by the order "hard-a-starboard," making one continuous movement of helm action. At the same time he gave an order for two short blasts on the whistle. Up to the time of giving these orders the *Kitano Maru* was keeping her course and speed and had shown no signs of keeping out of the way. He thought that she was trying to cross his bows, and came to the conclusion that the best action he could take to aid in averting a collision was to hard-a-starboard with the object of passing under her stern. In his evidence he explained that he did not port because that would have opened up the whole of his port side, and that he did not slacken speed or stop or reverse because he could not say how long it would have taken him to take the way off his ship at the speed she was then making; moreover, he thought that if he had taken off way he would have lost more than half of his manœuvring power and that, if the *Kitano Maru* had held on, she might have struck the *Otranto* amidships. The learned judge in giving judgment said: "To starboard in such a position cannot be right. I have said so in many cases and what is more important, I think the Court of Appeal and the House of Lords have said the same. I agree that every case has to be decided on its own facts, but I can see nothing to distinguish this case from other cases in which I have decided that for the stand-on ship to starboard in such a position cannot be right. It can only assist to avoid the collision if the give-way ship continues to keep her course and speed. If, though too late, the give-way ship ports, then the starboarding of the stand-on ship makes collision almost inevitable. And the stand-on ship has no right to assume that the give-way ship will not port. The golden rule in such cases is to take off your way. If you take off your way you are very unlikely to make a collision. You are giving more time for the give-way ship, if she persists in her wrong doing, to cross ahead of you, or if she repents too late or acts too late—well, you give her more time to act, it may avoid collision altogether, and it is almost certain to reduce the damage. . . . . I am advised—and I quite agree—that hard-a-starboarding was wrong." Later on in his judgment the learned judge states that he is not going to say that anybody ought in the circumstances to hard-a-port; the question, therefore, is reduced to whether the *Otranto* was negligent in hard-a-starboarding instead of taking off her way and keeping her course. Our assessors have advised us that in the circumstances hard-a-starboarding without decreasing speed was good seamanship. Thus we are faced with opposite opinions expressed by the two sets of assessors who presumably are equally competent to advise on such a technical question. The duty of the Court in such circumstances is pointed out in clear and unmistakable terms by Lord Sumner in *The Australia* (1) as follows: "The appointed Court must exercise its function of deciding, and find consolation in a consciousness at any rate of blank impartiality. . . . . The technical advice given below is advice available for the consideration of the appellate tribunal, as well as that given by its own assessors. The latter are not substituted for those previously consulted; they are additional to them, and if one adviser or two advisers are to be preferred, it is because in the judgment of the Court the advice given is such as, in itself, is the more acceptable. . . . . If, as may happen, a judge cannot decide in his own mind whether or not the advice he receives is sound, his position is simply that the point is not proven, and the loss falls on the party, who bears the burden of proof on that issue." My duty therefore is to exercise my own judgment paying due regard to the advice given by the Elder Brethren in the Court below as well as to that given to us by our assessors.

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(1) (1890) 15 App. Cas. 223, 238.

The learned judge seems to me to have founded his judgment to a great extent upon a rule which he calls "the golden rule to take off way." With the utmost respect for the opinion of the very experienced judge, I cannot think it right for the Court to lay down a rule prescribing the particular action to be taken by the stand-on ship when she finds herself in the predicament indicated in the note to art. 21. Under the regulations the action, which it then becomes her duty to take, is left to the judgment of her navigator, as such action must necessarily depend upon and vary with the circumstances. To take any action before the critical moment has arrived is, of course, entirely wrong, and to starboard in that case is the worst possible action that could be taken, because it means entering the water which should be left free to enable the give-way ship to pass under the stern of the stand-on ship if she is so minded. But the position is different when the give-way ship has let the time go by and she is so close that she cannot any longer safely take any port helm action in order to keep out of the way. In such circumstances the master of the stand-on ship must be free to exercise his best

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(1) [1927] A. C. 145, 151, 153.

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judgment as to the appropriate action to be taken, and the only requirement is that the action should be such as might reasonably be taken by a competent navigator. To hold that any action other than taking off way is prima facie an act of negligence would in many cases operate to relieve the give-way ship, which had caused the difficulty, from the burden of proving contributory negligence, and cast the burden of proving that the action taken by the stand-on ship was not negligent on that ship, which in my opinion would be contrary to what was said by the House of Lords in *The Tasmania*. (1)

With regard to the statement made by the learned judge that the *Otranto* had no right to assume that the *Kitano Maru*, although too late, would not port, this is contrary to the opinion expressed by Bowen L.J. in *The Memnon*. (2) In that case the stand-on ship was held to blame for not having taken off her way soon enough in breach of art. 18 of the Regulations of 1884, and the Lord Justice says: "It seems to me contrary to common sense to maintain that, when you are watching a person who is doing something wrong and unseamanlike, you have a right to assume that at some given moment he will cease that course of conduct and adopt another." The same reason which led the master of the *Otranto* to conclude that the time for taking action had arrived—namely, his assumption (which has been held to have been justified) that the *Kitano Maru* was trying to cross his bows and would therefore keep her course and speed—led him to hard-a-starboard in order to pass under her stern, which to the best of his judgment was the safest course to adopt in the circumstances. He did not lose his nerve, nor was he acting in the agony of collision without any time for reflection. He states in his evidence that he considered the various courses open to him and gave his reasons for starboarding. At the trial he adhered to his opinion that this action was in the circumstances the best he could have taken to avoid collision without unduly endangering his ship and the lives he had on board, an opinion which was emphatically indorsed by our assessors. He cannot, I think, reasonably be held to be negligent for not anticipating that, after the *Otranto* had given the proper signal indicating that she was directing her course to port, the *Kitano Maru* would take port-helm action, with the inevitable result that she would bring herself across the *Otranto's* bows. The obvious inference to be drawn from the action taken by the *Kitano Maru* is that at the critical time she was not keeping a proper look-out, and was being navigated by an incompetent person who only woke up to the fact that the *Otranto* was in close proximity when he heard her signal, and then, either through ignorance or loss of nerve, took the wrong action—an action which could not, and in this Court was not attempted to be, justified. If, on hearing the *Otranto's* signal, the *Kitano Maru* had acted in a reasonable manner, and either had gone full speed astern or had starboarded, it is plain that with the aid of the *Otranto's* action the threatened collision would have been averted. Even if she had then kept her course and speed, it now turns out as a mathematical proposition that the *Otranto's* action would have avoided a collision and the latter would have passed safely under her stern.

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(1) 15 App. Cas. 223.

(2) (1888) 6 Asp. M. L. C. 317, 320.

Taking all the circumstances into consideration and exercising my judgment on such a technical question to the best of my ability, I prefer the opinion of our assessors to that of the assessors in the Court below. The question, however, is not whether the *Otranto* has proved that she acted rightly in starboarding, but whether the *Kitano Maru* has proved that the action taken by the *Otranto* was wrong in the circumstances. The *Kitano Maru* came into Court with a concocted story. She has therefore only herself to blame that the Court is unable to say what action she would have taken or what would have happened if the *Otranto* had taken off way instead of starboarding. The learned judge, as I understand his judgment, has condemned the *Otranto*, not because he has arrived at the conclusion that if she had taken off way the collision would have been avoided, or the damage reduced, but because by starboarding she broke the golden rule he refers to. If I am right that there is no such rule, it follows that the *Kitano Maru* has not discharged the onus which, according to the decision of the House of Lords in *The Tasmania* (1), rests on her. Even if, however, in the opinion of the Court it would have been wiser to have taken off way instead of hard-a-starboarding, I think that the master, who acted according to the best of his judgment in the difficult position in which he found himself, was at most guilty of an error of judgment, and that his action cannot justly be held to have been negligent. The observations made by the President (Sir John Bigham) in *The Tryst* (2) are in my opinion much to the point on this question. There the *Ortona* was the stand-on ship, and when she found herself so close to the give-way ship that action by the latter alone could not avoid a collision she hard-a-ported keeping her speed. The give-way ship was held to blame for the collision which ensued, but it was contended by her that the *Ortona* was also to blame, as she ought not to have ported at all, and in any event she ought to have taken off her way. The President said: "Then it is said that the *Ortona* should be held partly to blame because she might and ought to have reduced her speed, and it is pointed out that, according to the engineer's evidence, an interval of three minutes elapsed between the order from the bridge to stand by and the collision; but in my opinion those in charge of the *Ortona* acted all through for the best. There may have been some error of judgment—something might have been done which would seem wiser when considered after the event—but there was in my opinion nothing which could be described as negligence on the part of those in charge of the *Ortona*."

Further, if, contrary to my opinion, the *Otranto* was negligent in starboarding, I am of opinion that the port helm action taken by the *Kitano Maru*, after the *Otranto* had given the prescribed signal indicating that she was starboarding, was a subsequent and separate act of negligence on her part, and that it was this act which was the proximate

(1) 15 App. Cas. 223.

(2) (1909) 79 L. J. (P.) 17.

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cause of the collision. If that be so, then the *Otranto* is entitled to recover in full: see *The Volute.* (1)

Lastly, if there be any real doubt whether the action taken by the *Otranto* was negligent or not, the finding of this Court ought to be that the *Kitano Maru* has not discharged the onus of proof which rests on her, and that therefore the whole loss falls on her.

Before parting with the case. however, I desire to say a few words about the authorities relied upon by the respondents' counsel. The learned judge did not state which of the cases he had in mind when he said that he thought the Court of Appeal and House of Lords had said that starboarding in circumstances similar to those prevailing in the present case could not be right. Counsel have however referred us to several cases decided in these Courts, all of which are, in my opinion, distinguishable from the present case, on the ground that it was held in each that the stand-on ship was to blame because she had disregarded some express direction contained in the Regulations.

In *The Khedive* (2) the House of Lords decided that the stand-on ship by starboarding had disregarded the express direction contained in art. 16 of the Regulations of 1863 requiring her to stop and reverse her engines, and that, as no discretion had been left to her by that article, she was to blame, although her master possibly rightly thought that his helm action would prevent or greatly mitigate the collision. This case shows clearly that where the regulations have been broken the question of the expediency of the action taken is irrelevant, and the fact that the master honestly thought that in the circumstances it would be better seamanship to take action instead of adhering to the regulations affords no excuse. In *The Memnon* (3) the Court of Appeal and the House of Lords held that the stand-on ship in keeping her speed had broken art. 18 of the Regulations of 1884, which required her (as well as the give-way ship) when approaching another ship so as to involve risk of collision to

(1) [1922] 1 A. C. 129, 136.

(2) 5 App. Cas. 876.

(3) 6 Asp. M. L. C. 317, 488.

slacken her speed or stop and reverse if necessary, and that therefore she was partly to blame for the collision. In *The Orduna* (1) the Court of Appeal and the House of Lords held that, although the give-way ship had not ported in time, yet the stand-on ship by starboarding had disregarded her duty under art. 21 to keep her course and speed. Lord Sumner puts the case in a nutshell as follows : " The evidence of the officer of the watch, that at the moment when he took helm action he judged the position to be a safe one, leaves him without excuse."

The Norman Monarch (2) is a very similar case to that of *The Orduna.* (1) It was there held by the Court of Appeal and the House of Lords that the stand-on ship by starboarding had broken the rule which required her to keep her course and speed, and was therefore to blame, although the give-way ship was also to blame for having acted too late. Again, in *The Athena* (3), the Court of Appeal and the House of Lords held that the stand-on ship had not succeeded in discharging the onus which lay upon her of justifying her departure from her duty to keep her course and speed. These three last mentioned cases are authorities for the proposition (which I understood the appellants not to dispute) that the duty imposed on the stand-on ship under the note to art. 21 to take action does not arise merely because the give-way ship does not take action to keep out of the way soon enough. They are most material on the question when and in what circumstances it becomes the duty of the stand-on ship to take action, but they do not support the proposition that when that time has arrived starboarding is necessarily or even prima facie an act of negligence. All the authorities to which our attention has been called show that if the stand-on ship departs from the rule to keep her course and speed before the crucial moment has arrived when it becomes her duty to take action, she will be held to blame because she committed a breach of the regulations, unless she can clearly show that the action so taken did not cause or contribute to the

(1) [1919] P. 381 ; [1921] 1 A. C. 250. (2) Lloyd's List, Dec. 10, 1918.
(3) 14 Ll. L. R. 515.

collision, and such breach will not be excused because the master considered it good seamanship under the circumstances to depart from the regulations. But where, as here, the regulations have not been broken, the question whether a ship has been navigated negligently or not must be determined on ordinary principles apart from the regulations. The party alleging negligence must prove that the navigator exhibited a want of reasonable care and skill. In such a case the competency of the navigator, his reasons for taking the particular action complained of, and the expediency of taking such action, are most relevant.

In view of my opinion that the appellants are right on the main question it becomes unnecessary for me to deal with the subsidiary question as to whether the learned judge was right in apportioning the blame equally between the two vessels, and I prefer not to express any opinion on that point. In the result, for the reasons stated, I am of opinion that this appeal succeeds, and that the judgment pronounced in the Court below should be varied by pronouncing that the collision was solely caused by the fault of the owners, master and crew of the *Kitano Maru* or some or one of them; by condemning the respondents in the whole of the appellants' counterclaim; and by condemning the respondents in the appellants' costs of the claim and counterclaim in the Court below and in the costs of this appeal.

GREER L.J. If it had not been that I am differing from the judgment of Hill J. and the judgment of Scrutton L.J. I probably would have contented myself by saying that I agree with the judgment that has just been delivered by Lawrence L.J. for the reasons stated by him, but having regard to the difference of judicial opinion, I think it necessary to read the judgment I have written. [His Lordship stated the issues and continued as follows:] The vessels had originally been on crossing courses nearly at right angles, the *Kitano Maru* heading a course S.E. by S. ¾ S. magnetic, and the *Otranto* a course N.E. by E. ¼ E. magnetic. As they were approaching each other the *Kitano Maru* had the

Otranto on her starboard side. The *Kitano Maru* was, therefore, the give-way ship under art. 19, and as soon as they became near enough to be described as crossing vessels, it was her duty to keep out of the way of the *Otranto*, and, under art. 21, it was the corresponding duty of the *Otranto* to keep her course and speed, unless the facts were such as to bring the case within the note appended to that article, which is as follows : " When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision " : see arts. 27 and 29. It is to be observed that the words are not " is so close that collision cannot be avoided," or " becomes so close " or " gets so close," " that collision cannot be avoided," but the words are " finds herself so close that collision cannot be avoided," words which, in my view, leave room for the exercise of a reasonable finding or judgment by the navigator of the stand-on ship.

The learned judge states his findings on the evidence as follows : " I accept the evidence from the *Otranto* that the *Kitano Maru* made no alteration till she was at the very outside three-quarters of a mile away, and probably less. I do not believe the *Kitano Maru* hard-a-ported more than once or gave a short blast more than once. The fact that the action taken was hard-a-port, and not port, confirms the conclusion that it was taken at very close quarters. If taken earlier a slight porting would have been sufficient. The fact that the starboard engines were reversed before the port engines also points to the engines being used to assist rapid action of the helm. On the other hand, the defendants' case I accept. It tells very much against themselves as well as against the plaintiffs. I accept it as an honest case. I believe the evidence of the defendants' witnesses. Their case is that the *Otranto* was travelling at about sixteen knots, and saw at about seven miles distance the *Kitano Maru* on a bearing which was accurately taken by the second officer ; that the bearing continued the same for about ten minutes ; that the second officer then sent a message to the master

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who came to the bridge. Then the master takes up the story (confirmed by the second officer). Eight minutes before the collision the *Kitano Maru* was judged to be two to two and a half miles away, and about three and a half points on the port bow. The bearing continued almost the same, varying only one degree. Three or four minutes before the collision when the distance, as the master judged, was a quarter to half a mile, and was judged by the second officer to be hardly three-quarters of a mile—up to that time the *Kitano Maru* had not altered her course or her speed or given any signal. Upon that the commander recognized that the position was very dangerous, and decided to take action, and about three minutes before the collision he gave an order 'starboard 15' and immediately 'hard-a-starboard.' That order was carried out, and he gave two short blasts. He brought the *Kitano Maru* a little on the port bow, and then—and not until then—the *Kitano Maru* began to turn to starboard and gave a short blast. Immediately upon that he gave an order hard-a-port, and before it could be carried out he countermanded it, and repeated hard-a-starboard, and followed that by full astern on both engines about a minute before the collision. At the collision the *Kitano Maru* was swinging to starboard and the *Otranto* to port. I accept this evidence. I find in fact that the two blasts of the *Otranto* preceded the one blast of the *Kitano Maru*. But, accepting it, I cannot do otherwise than find that the *Otranto* hard-a-starboarded, and did not take engine action and reverse until a very short time before the collision."

The learned judge also finds that, at the time that the *Otranto* starboarded, the time had come when the *Otranto* was entitled to act in accordance with the directions contained in the note to art. 21. He held that some latitude must be allowed to the master of the stand-on vessel in making his decision as to whether a collision can or cannot be avoided by the action of the give-way vessel alone, and that, in the case under consideration, the time had come when the *Otranto* was entitled to act, and that it could not be said that her master acted too soon. The *Otranto* was, therefore, not in the wrong in failing to keep her course and speed if the time had arrived for her to act under the note. I will assume for the time being that this finding of Hill J. in this respect was correct, reserving the point for consideration after dealing with the case on this assumption. Hill J. decided that, though the time had come for her to take such action as the best aid to avert collision, she had taken the wrong action, and by doing so, she was negligent or blameworthy. The first question to be determined is, whether the learned judge was right in this view.

A great many authorities have been cited to us upon this question, but after all, the question in every case is a question of fact to be determined on the proved facts of each case, and is not a question of law to be determined on authority. Assuming that the learned judge was right in coming to the conclusion that when the *Otranto* starboarded the time had come for her to take some action, which in the judgment of a careful and skilful navigator was likely to best avert collision, I am of opinion that the master of the *Otranto* did not act negligently or in any way inconsistent with skilful seamanship. Judged by what in fact happened, her master took the wrong course and one which, having regard to the subsequent navigation of the *Kitano Maru* resulted in the collision, but the reasonableness or skilfulness of the course adopted by the master of the *Otranto* is not to be determined by the event, but by the facts that were present to his mind at the time that he exercised his judgment. It was plain to him, from the bearings that had been carefully taken from time to time, that the *Kitano Maru* was not in fact taking any proper steps to keep out of his way. It was reasonable for him to conclude that she was not keeping a proper look-out and that she was not going to take any steps in sufficient time to avoid colliding with him if he did nothing. If he was right in his judgment as to what the *Kitano Maru* was likely to do, it follows that he would be right in his conclusion that a collision would be avoided if he hard-a-starboarded. If he hard-a-starboarded, he, thereby, enabled the *Kitano Maru*, by continuing her course, to keep out of his way. After giving the order "hard-a-starboard," the appropriate signal was given to the *Kitano Maru* that the *Otranto* was directing her course to port, whereupon the master of the *Kitano Maru* gave an order which, under the circumstances, was, in my judgment, bound to lead to a collision. Instead of keeping out of the way of the *Otranto* by continuing straight on, so that the vessels would pass starboard to starboard, he ported, thereby, in my judgment, making it inevitable that the two vessels would come into collision. The master of the *Otranto*, when he saw what the other vessel was doing, gave a momentary order to port, which he immediately rescinded before it had had time to check the direction of his vessel to port. At that time I do not think he could have saved the situation by porting, though possibly the collision would have happened in a way different from the way in which it did happen. The learned judge, however, held, following his own decisions in many cases where the facts were similar though not identical, that to starboard in such a position could not be right, and that "the golden rule" to be observed was that she should take off her way. In my judgment, though the rule may be a golden one, it is not an absolute one and it is not a rule of law. As it happened, in the present case, if the master had adopted engine action and reversed his engines, it is probable, but by no means certain, that a collision would not have taken place at all, but in any case he had to act without any knowledge as to when, if at all, the master of the *Kitano Maru* was likely to give an order hard-a-port. I think he was entitled to assume that if he starboarded and gave notice to the *Kitano Maru* that he was doing so, the *Kitano Maru* would then see that the only reasonable course for him to take would be for him to keep out of the way of the *Otranto* by continuing in the course in which he then was. I cannot think that it was negligent or blameworthy on the part of the master of the *Otranto* to assume that the master of the *Kitano Maru* would, after noticing that the *Otranto* was directing his course to port, take the course which was obviously the most dangerous and which would not keep the *Kitano Maru* out of the way of the *Otranto*, but would put her into the way of the *Otranto* and make a collision certain. Under these circumstances, without the assistance of the assessors, I should have come to the conclusion that the learned judge was wrong in holding the *Otranto* partly to blame for the collision, but my judgment in this case is confirmed by the judgment of the very experienced assessors who assisted us in this Court.

In this case questions have been put to our assessors, and their answers seem to me to show that they agree with the view that I have expressed, but great reliance was placed by Mr. Dunlop, for the respondents, on a number of cases which he cited, especially on *The Orduna.* (1) In that case, the *Orduna* and the *Konakry* were crossing vessels at a very obtuse angle, there being only a difference of 17 degrees from opposite courses. It is obvious, under these circumstances, that it might be quite safe for the give-way vessel to postpone porting until she was very close to the other vessel, as a very slight porting would have kept her out of the way of the *Orduna ;* and the *Orduna* was held to blame because she starboarded, according to her own evidence, at a time when those on board her thought that the vessels would pass safely on the course on which they were, but that it was desirable to give a wider berth to the *Konakry*, and they starboarded for that purpose. It was there held that the note to art. 21 had no application to the case, as the action of the *Orduna* in starboarding was not required to avoid collision, and, therefore, it was not justified by the note : see the speech of Viscount Finlay and the short judgment of Lord Sumner. That case has no similarity, in my judgment, to the present case, where the vessels were approaching on almost perpendicular courses.

A number of other cases were cited by Mr. Dunlop in which it was decided that starboarding was a wrong manœuvre. The decision in each case must depend on the special facts proved in each case, and in my judgment there is no rule of law or good sense to the effect that it is never right for a

(1) [1921] 1 A. C. 250, 255, 260.

stand-on vessel to starboard or that it is always negligent navigation for her to do so. Art. 21 puts a severe burden upon the officer in charge, but it does not prevent him from saying that "under the circumstances as I saw them, at the moment I was called upon to act it appeared reasonably safe for me to take the action that I did, and, therefore, I was not negligent." Though this is not a case of action taken by a master who lost his head in the agony of collision, the circumstances which called for action on his part were not dissimilar to those which call for action in the agony of collision. He was put into a position of difficulty by the initial fault of the *Kitano Maru*, and he had to do that which appeared to be reasonably safe at the time he acted. The action that he took would have been reasonably safe if, after notice, the *Kitano Maru* had done what she ought to have done, and for my part I cannot hold the *Otranto* to blame for what happened, because her master acted upon the assumption that when the master of the *Kitano Maru* knew that he was starboarding he would have made a correspondingly safe move by starboarding himself, or, would have continued on his course. I cannot help thinking that the learned judge allowed himself to be too much under the influence of his decisions in other cases, and has stated as an absolute rule of navigation a rule which, though usually right, still admits of exceptions.

For these reasons, on the assumption above made, I think that the *Kitano Maru* should have been held solely to blame for the collision on the ground that there was no negligent navigation on the part of the *Otranto;* and, secondly, on the ground that even assuming the *Otranto* to have been negligent in starboarding, still the real cause of the collision was the subsequent negligence of the *Kitano Maru* in porting when, if she had acted with reasonable care, she would either have starboarded, or kept straight on.

I have hitherto assumed that the learned judge was right in his view that the time had arrived when the master of the *Otranto* was entitled to act by altering his course or speed, but it was contended before us that inasmuch as at the time he did alter his course, and if the other vessel immediately ported, a collision would have been avoided, the *Otranto* should be held to blame, because she committed a breach of art. 21. We have been advised, and I think rightly advised, that, if the *Otranto* had kept her course and speed and the *Kitano Maru* had ported at the time she did, the vessels would have passed clear of one another and there would have been no collision. It was argued that upon these facts the first part of art. 21 was still in operation and that the circumstances, which under the note to that article made it the duty of the *Otranto* to take such action as would best aid to avert collision, had not happened. Art. 21 and the note thereto must be read in conjunction with art. 27, which says: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." I think the true principle upon which these two rules are to be applied to the facts of any particular case is that which was stated by Lord Herschell in *The Tasmania* (1), where he says: "As soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd rule"—the 22nd rule at the time of this decision was the rule under which the stand-on ship had to keep her course—"He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened." In *The Albano* (2) Sir Gorell Barnes in giving the judgment of the Privy Council says this: "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this." In that case the suggestion against the master was that he had acted too late, but I do not see why the same latitude should not be allowed to him when the question is whether he acted too soon. Indeed, it seems to me more important to see that the regulations should not be so interpreted as to render it next to impossible for the stand-on ship to act in time than that he should be allowed a little latitude in acting too late, because acting in time may save the collision, but acting too late can never save a collision. If he is obliged to wait until the last moment, when it in fact becomes impossible for the give-way ship to avoid a collision by her act alone, in ninety-nine cases out of a hundred that moment will be allowed to pass, and a collision will become inevitable. The possible consequences of such an interpretation of the rules seem to me quite appalling in a case like the present, where the master of the *Otranto* was faced with the reasonable probability of a disaster to both ships, involving the loss of many valuable lives, if he did nothing, and, on the other hand, a high probability that if he starboarded and gave the appropriate signal the officer in charge of the other ship would do what a careful and observant officer would do; that is to say turn away from him, and not into him. Unless I am forced by the regulations, or the decisions of this Court, or the House of Lords, to hold that the *Otranto* broke the regulations and was, therefore, partly to blame, I am not inclined so to hold.

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(1) 15 App. Cas. 223, 226. (2) [1907] A. C. 193, 207.

In the case of *The Olympic and H.M.S. Hawke* (1) Lord Parker uses these words: "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger. If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal

(1) [1913] P. 214, 245, 279.

obligation of maintaining her own course and speed." In the same case Vaughan Williams L.J. cites a statement with regard to the rules in Marsden on Collisions, as follows: "The rule requiring a ship to keep her course and speed must be observed strictly. So long as there is a possibility of the other ship clearing her, she must stand on. Thus Sir James Hannen refused to find a sailing ship to blame for taking no step, until the last moment, to avoid collision with a steamer which she saw was taking no measures to keep out of the way. The guide of the steamer's action is the presumption that the sailing vessel will keep her course. With reference to the same rule under a previous Act, Dr. Lushington said: 'I wholly deny that danger would be averted, or that infinitely greater danger would not occur, if a vessel close-hauled on the larboard tack, on descrying a steamer, were to take upon herself to deviate from her course for the purpose of getting out of the way; because I am of opinion that by so doing it would lead to the chance of infinitely more collisions than at the present.'" The Lord Justice then went on to say: "It seems uncertain on the cases whether the exception to the rule only arises when a collision is inevitable unless averted by the ship which has to keep her course and speed, or whether the exception applies when the collision is so probable that good seamanship, if there were no rule, would justify action by the ship, bound to keep her course, to avert collision."

I prefer to follow the latter alternative, suggested by the Lord Justice's comment, to the statement in Marsden, or the expression of Dr. Lushington's views on rules which were differently framed from those at present in operation, and I prefer to follow the opinions of Lord Herschell in *The Tasmania* (1), of Sir Gorell Barnes in *The Albano* (2), and of Vaughan Williams L.J. and Lord Parker in *The Olympic and H.M.S. Hawke* (3) rather than what I conceive to be the too rigid statements of the effect of the regulations in Marsden and by Dr. Lushington in the older cases.

(1) 15 App. Cas. 223.
(2) [1907] A. C. 193.
(3) [1913] P. 214, 245, 279.

At first sight the decision of *The Khedive* (1) seems to be contrary to the view I am expressing, but that was a decision under art. 16 of the Regulations of 1863, which says that every steamship when approaching another ship so as to involve risk of collision shall slacken speed, or, if necessary, stop and reverse. It was there held that this applied to the stand-on ship, and was an express order to slacken her speed, and she could not escape responsibility of a breach of the rules by saying that she starboarded in a manner that was not negligent under the circumstances. That rule has been altered, the present rule being: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse." This applies to the give-way ship, and not expressly to the stand-on ship. The note to art. 21 was not added until 1897, and, therefore, was not in operation at the time of the decision in *The Khedive.* (1) I think the note justifies reference to art. 27 as bearing on the interpretation of the note.

Some useful observations on this subject are to be found in the judgment of Bargrave Deane J. in *The Huntsman* (2), where he says this: "Upon this question as to altering her speed by a vessel whose duty it is to keep it under art. 21, it is almost impossible to lay down any fixed rule. Good seamanship requires that in any case a time may come when the course or speed or both of a stand-on ship may and ought to be altered. The difficulty in such a case is to decide at what exact time such alteration not only may be but ought to be made. It is impossible, mathematically speaking, to fix that time—various ingredients come into the matter—the light or clearness of the atmosphere by which a fair judgment of distances may be formed—the speed and course of the other vessel from which an accurate estimate may be formed of the point where the two intersecting courses will meet if both vessels continue their course and speed—and the further almost insuperable difficulty of detecting, as in this case, at one o'clock in the morning, the precise moment when

(1) 5 App. Cas. 876.

(2) 11 Asp. M. L. C. 606, 608.

the giving-way vessel may be altering her course and the precise moment when if she does not alter her course a prudent officer in charge of the stand-on vessel feels it to be his duty to do something, and if something what that something is to be. The burden of taking action and departing from the rule is cast upon that officer, who has to determine when that point of departure ought to occur. It must not be pressed too severely in any case. If the officer is carefully watching the movements of the other vessel and endeavouring to do his best to judge when the time shall arrive for him to act, it ought not to be made a complaint against him that he waited too long or he acted too soon. If he acts too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel. It is difficult to determine the critical moment, and some latitude must be allowed to the officer of a stand-on ship who is clearly doing his utmost in a position of difficulty caused by bad navigation by those in charge of a giving-way ship." I agree with all those observations. Similar considerations influenced Sir John Bigham P. in *The Tryst*. (1)

In my view, it is not the law that, if the stand-on ship is proved to have altered her course or speed before the last moment at which it is possible for the give-way ship by her own action alone to avoid collision, the stand-on ship must be held to blame. Some reasonable margin of time must be allowed to the stand-on ship both before and after the last possible moment. I also think that in this case Hill J., advised by the Trinity Masters with whose opinion our assessors agreed, was right in holding that the *Otranto* did not act outside that margin of time. I do not feel compelled to give the rules a construction which would involve an obligation on the master of the stand-on ship to do that which no human being could possibly be expected to do. The last moment at which the give-way ship can, by its own act, avoid a collision is a point of time infinitesimal in extent. It passes almost at the moment when it arrives. I cannot think that the rules mean that the stand-on ship must stand-on and fail to take measures to avoid an impending danger until the exact mathematical point of time has arrived when the give-way ship cannot, by anything she does, avoid a collision. I think the note to art. 21, with its reference to art. 27, enables us to give a wider construction to art. 21, and allow some latitude to the stand-on ship to act before the exact mathematical point of time, to which I have referred, has arrived.

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(1) 79 L. J. (P.) 17.

The learned judge in this case, his two assessors and our assessors, have come to the conclusion that when the *Otranto* starboarded, it was sufficiently near the time at which it was necessary to do something to avoid the risk of a collision that the *Otranto* must be held not to have acted too soon. It is said to be impossible to take this view, having regard to the decisions of the House of Lords in *The Orduna* (1); *The Athena* (2); and *The Norman Monarch.* (3) In my judgment there is nothing in any of these decisions to prevent the Court from holding that, in the present case, the *Otranto* did not act too soon. In *The Norman Monarch* (3) it does not appear to have been contended that, on the evidence accepted by the Court, the *Phrygia* did not act too soon. She appears to have starboarded twice, once, under the impression that the *Norman Monarch* was a sailing vessel. I think the case was decided on questions of fact, and I can extract no rule of law from it. The same is true of *The Athena.* (2) It is to be observed that, both in *The Norman Monarch* (3) and in *The Athena* (2), as in *The Orduna* (1), the vessels were approaching at a fine angle, and, therefore, a very little porting at a late moment by the give-way vessels would have been sufficient to prevent a collision. The main contention in *The Athena* (2) was the same as in *The Orduna* (1), "that at the time when the stand-on ship starboarded, the vessels were no longer crossing vessels, and the risk of collision had ceased." On the facts Hill J. found against this contention. It appears from the report in the Court of Appeal (4) in the judgment of Bankes L.J. that the point that was argued in the present case was also argued in *The Athena.* (4)

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(1) [1921] 1 A. C. 250.
(2) 14 Ll. L. R. 515.
(3) Lloyd's List, Dec. 10, 1918.
(4) (1922) 10 Ll. L. R. 729, 731.

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Bankes L.J. says: "Now the other point is this: Mr. Bateson seeks to bring his case within the reasoning which underlay the decisions in the cases of *The Albano* (1); *The Huntsman* (2); and *The Ranza.* (3) Those were all cases where a man, though not acting perhaps in the agony of collision, acted under the fear of collision in the sense of something having to be done immediately because of the fear of collision: but it seems to me quite impossible to bring this case within that class of authority because the case of the *War Bahadur* is this: That when I took the action I did take by starboarding the helm I was under no fear of collision at all; I thought that all danger of collision had passed, I acted as I did because the vessels had ceased to be crossing vessels, and I merely did it as a matter of precaution in order that I might not cause inconvenience by the two vessels passing too close to each other." I understand these observations of the Lord Justice as leaving open the question whether the navigator of a stand-on ship can be excused if he ceases to keep his course and speed at a time when it would seem reasonable to a skilful navigator that it was necessary for him to act in order to avoid immediate danger, though that time may be before the exact moment when the give-way ship could not, by her own act, avoid a collision. The judgments of Hill J. and the Court of Appeal in *The Athena* were affirmed in the House of Lords (4), as I read the report, on the ground that the House of Lords were not prepared to interfere with the findings of fact of the trial judge and of the Court of Appeal.

I have already dealt with the decision in *The Orduna* (5), which appears to me to be almost exactly similar to that in *The Athena.* (4) In my judgment, there is no rule of law established by these cases which prevents this Court from accepting the finding of Hill J., who saw and heard the witnesses, that the time had come when it was reasonably necessary for the master of the *Otranto* to act in order to avoid immediate danger. Some margin of time must be allowed to the stand-on ship before and after the last moment has arrived. It has still to be considered in every case whether the stand-on ship has acted within that margin. I am not myself disposed to place great reliance on estimates of time and position made by observers on a rapidly moving vessel, or on calculations based on mathematical estimates of the course of a vessel, determined by its theoretical turning circle. I think more weight should be attached to the judgment of an experienced and trustworthy navigator, whose evidence the judge who saw and heard him accepts. I think Hill J., the Trinity Masters, and our two assessors, were right in the view they have taken that the time had come for the master of the *Otranto* to make some alteration in his course or speed to avoid immediate danger, and, I also think that, in starboarding, he took action that was not either negligent or unseamanlike.

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(1) (1907) 10 Asp. M. L. C. 365.

(2) 11 Asp. M. L. C. 606.

(3) 79 L. J. (P.) 21*n*.

(4) 14 Ll. L. R. 515.

(5) [1921] 1 A. C. 250.

In my judgment, this appeal ought to be allowed on two grounds: (1.) that the *Otranto* was not, to any extent, to blame for the collision; (2.) that in any event, the proximate, effective, substantial or real cause (whichever be the right word) was the negligence of the *Kitano Maru* in porting after the *Otranto* had signalled saying that she, the *Otranto*, was starboarding. I agree that the order of this Court should be as stated in the judgment of Lawrence L.J.

Appeal allowed.

Solicitors for the appellants: *Parker, Garrett & Co.*
Solicitors for the respondents: *Waltons & Co.*

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CHALMERS *v.* CHALMERS,

(THRELFALL INTERVENING.)

(KING'S PROCTOR SHOWING CAUSE.)

Divorce—Decree Nisi—King's Proctor's Intervention to disprove Charge of Adultery on which Decree Nisi has proceeded—Fresh Evidence—Res judicata—Matrimonial Causes Rules, 1924, *rr.* 46, 51.

A finding of adultery as a fact on which a decree nisi has proceeded is not res judicata, so that it cannot subsequently be questioned in the Divorce Division in any event, nor is resort to the Court of Appeal the only means of reviewing it. The decree nisi resembles any other order nisi in that it proceeds merely upon the materials before the Court at the time of its pronouncement and cause can be shown against it being made absolute. The King's Proctor, not being a party to the suit as originally constituted, cannot resort to the Court of Appeal, but if he comes to the conclusion that the decree has been obtained contrary to the justice of the case he must intervene and show cause against making the decree absolute. For that purpose he may call fresh evidence to show that there has been no adultery notwithstanding the previous finding in the affirmative.

KING'S PROCTOR'S INTERVENTION.

On January 24, 1929, May Elizabeth Chalmers the petitioner obtained a decree nisi dissolving her marriage with Frederick Zabell Chalmers on the ground of his adultery with Dorothea Mary Threlfall.

The petition, which was dated November 9, 1927, contained, as subsequently amended, a general charge and specific charges of adultery dated December 31, 1926, and February 26 and 27, 1927. The respondent filed an answer to the original petition denying the charges. Dorothea Mary Threlfall intervened and filed an answer to the original petition denying the charges.

The respondent filed a further answer to the amended petition.

At the hearing neither the respondent nor the intervener appeared to contest the charges, and counsel for the petitioner opened to the Court as a material fact that the mother of the intervener had in communication with the Court and the King's Proctor alleged that the intervener was virgo intacta.

On the evidence of the petitioner, the contents of a correspondence between the respondent and intervener which, as was suggested, established the fact of an adulterous intercourse, coupled with the evidence of a servant on the premises where adultery was alleged to have been committed, the Court (Hill J.) pronounced a decree nisi. In doing so the learned judge commented upon the allegations that the intervener was virgo intacta, and suggested that if there was any substantial ground for the allegation that she had never committed adultery, the intervener should communicate with the King's Proctor.

The King's Proctor intervened in the suit, and in due course filed his plea alleging that the decree was obtained contrary to the justice of the case, in that the following material fact was not brought to the notice of the Court—namely, that the respondent had not committed adultery with the intervener or at all. This plea was in the course of the hearing of the intervention amended as stated below.

On the intervention coming on to be heard.

Bayford K.C. and *C. L. Beddington* for the petitioner. The intervention should be dismissed. The petitioner made disclosure of the material fact as then alleged at the hearing. The decree was rightly pronounced, all the materials being before the Court.

[HILL J. Is the decree nisi res judicata ? Or is it merely a preliminary finding which can be departed from on further facts ?]

Sir J. B. Melville S.-G. and *W. N. Stable* for the King's Proctor. The King's Proctor may show cause on the ground that the charge on which the decree nisi proceeded was not true and can adduce fresh evidence : *Crawford* v. *Crawford and Dilke.* (1) In that case Sir J. Hannen said that the question was whether after a specific charge had been decided in the affirmative the Queen's Proctor might intervene to show that

(1) (1886) 11 P. D. 150.

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the finding should have been the other way, and he added, referring to *Gladstone* v. *Gladstone* (1): "Illustrations were given to show that there may be cases in which the Queen's Proctor would be entitled to intervene for the purposes of showing that the charges could not be true—insanity, an alibi, absence from the country, and so on. But these are only illustrations of what are material facts for the purpose of disproving charges which have been erroneously substantiated or treated as proved." It is true that in *Crawford* v. *Crawford and Dilke* (2) the matter discussed was the form of the Queen's Proctor's plea and the particulars of it, but we submit that the principle there laid down, even if obiter, finds another illustration in the present case.

Bayford K.C. The application should be to the Court of Appeal. There are no fresh facts.

The *Solicitor-General* in reply. *Partington* v. *Partington and Atkinson* (3) shows that the finding of adultery in the decree nisi is not conclusive.

[He also referred to Matrimonial Causes Rules, rr. 46 and 51.]

HILL J. The trial of this case took place after answers denying the charge had been filed by the respondent and the intervener, but neither appeared at the hearing. At the hearing counsel for the petitioner very properly brought to the notice of the Court the allegation made that the intervener was virgo intacta. But neither the respondent nor the intervener appeared to set up that case. Evidence was tendered of a maidservant as to the respondent and the intervener being in the same bedroom and suchlike evidence. I said: "The husband is not here to deny the charge against him. The intervener entered a defence to the original petition, which alleges adultery on February 26 and 27, 1927, but she put in no answer to the amended petition charging adultery on December 31, 1926. There are letters of her mother to the Court and one letter by her to the Poor Persons' Department. It does not appear why the respondent and the intervener do not appear. If there is any foundation for the suggestion as to the condition of the intervener and that she has never committed adultery, she can still communicate with the King's Proctor. As matters stand, however, I find on the present evidence that it is clear that she has committed adultery with the respondent. There must be a decree nisi with costs."

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(1) (1875) L. R. 3 P. & M. 260.
(2) 11 P. D. 150.
(3) [1925] P. 34

The King's Proctor has now intervened and filed his plea. It is contended that the King's Proctor cannot intervene to raise this point and argue and call evidence as to the virginity of the woman, on his submission that there has been no adultery, because adultery has already been found as a fact. That question seems to me to depend upon whether the finding of adultery in a decree nisi is res judicata so that it cannot be questioned in this Court in any event. It is further contended that the proper course is resort by the parties to the Court of Appeal or possibly an application for a new trial. But the question remains whether the Court can refuse to entertain an intervention of the King's Proctor alleging that the decree nisi was pronounced contrary to the justice of the case by reason of a material fact not being brought to the notice of the Court. I think that the intervention comes within the rule laid down by Sir J. Hannen in *Crawford* v. *Crawford and Dilke* (1): "If the Queen's Proctor comes to the conclusion that there is a ground for supposing that a decree has been obtained contrary to the justice of the case, then it is his duty to intervene." Unless the Court is prevented from investigating the allegation that the intervener is a virgin, there is according to the rule I have quoted good ground for this intervention. The King's Proctor has obtained the information on which he intervenes on my suggestion. Matrimonial Causes Rule 51 shows in what way he may proceed. He cannot resort to the Court of Appeal because he was not a party to the suit when the decree was pronounced. A decree nisi proceeds upon the materials before the Court at the time when it is pronounced, but before a decree is made absolute cause may be shown

(1) 11 P. D. 150, 157.

why it should not be made absolute. The appropriate person to show that cause is the King's Proctor, who says that he desires to show that the woman, with whom the respondent is charged with committing adultery, is a virgin. The intervention must proceed to a hearing.

The *Solicitor-General* then tendered the following amendment of the King's Proctor's plea—namely, by adding to his previous allegation that a material fact had not been brought to the notice of the Court, the following further allegation. The King's Proctor alleges that the intervener is and was at all material times virgo intacta and did not in fact commit the alleged adultery whereof circumstantial evidence was given at the trial. The amended plea further alleged that untrue evidence had been given at the hearing in other respects.

The hearing of the intervention proceeded on February 18, 19 and 20. The Judge found that the intervener was virgo intacta, and that some of the evidence given at the first hearing was untrue. He also found other new facts, and on the whole of the evidence held that the charge of adultery was not proved, allowed the intervention, rescinded the decree nisi and dismissed the petition.

Petitioner to have her costs. The King's Proctor did not ask for costs.

Solicitors for the Petitioner: *Cohen & Cohen; The King's Proctor.*

R. M. M.

Applied. Gunner *v.* Gunner and Stirling. [1948] 2 All E.R. 771.

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Divorce—Marriage Settlement—Jurisdiction to apply Property settled—Definition of Settlement—"Post-nuptial"—"Parties whose marriage is the subject of the decree"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 191, 192.

A respondent wife after her husband had filed a petition seeking dissolution of his marriage with her on the ground of her adultery, executed a settlement of interests to which she was entitled under a will and under the marriage settlement of her parents, and settled them on herself for life with remainder to all or any of her children or child, of whom she had two by her then husband, who being males should attain the age of twenty-one years or being females should attain that age or marry, reserving a general power of appointment by will in default of any surviving children and further reserving a power of appointment both of capital and income in favour of any surviving husband. After decree absolute she executed a deed poll, declaring that her income under the settlement should be for her separate use without power of anticipation. Shortly after the execution of the deed poll she intermarried with the co-respondent in the suit:—

Held, that the settlement was a "post-nuptial settlement" made on the parties whose marriage was "the subject of the decree," and was therefore within the definition in the Judicature (Consolidation) Act, 1925, s. 192, of the class of instrument with which the Court had power to deal under the section.

Decision of Bateson J., ante, p. 99, reversed.

Appeal from a decision of Bateson J. (1) dismissing a motion for the confirmation of a registrar's report on a petition under the Judicature (Consolidation) Act, 1925, s. 192, for the application of property settled by a marriage settlement.

The parties were married on July 30, 1921, and there were issue of the marriage two children, a boy born in 1922 and a girl born in 1924.

On October 22, 1928, Colonel James Lister Melvill the husband obtained a decree dissolving his marriage with Irene Melvill the wife, on the ground of her adultery with the co-respondent Hugh Woodward. The custody of the children was given to the petitioner.

The divorce petition was filed on May 26, 1927, and after it had been set down for trial as an undefended case on

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(1) Ante, p. 99.

November 16, 1927, the respondent wife on December 30, 1927, executed a settlement by which she settled interests to which she was absolutely entitled on her mother's death, under her grandfather's will and her parents' marriage settlement on herself for life with remainder to all or any children or child of the settlor, who being males should attain the age of twenty-one years or being females should attain that age or marry. The settlor was therein described as the wife of the petitioner in the suit, as, in fact, she then was. The consideration was expressed to be " the natural love and affection of the settlor " for the two children of her marriage, though the settlement was in fact upon any children of the settlor. In default of surviving children power was reserved to the settlor to appoint by will. The settlor also had a power to appoint the income and not exceeding a moiety of the capital of the trust fund to any surviving husband.

Bateson J. was satisfied that the object of this settlement was to prevent property of the wife from coming within the reach of any application that the husband might make under ss. 191 or 192 of the Judicature (Consolidation) Act, 1925, for a settlement of the wife's property or for the application of property settled by a marriage settlement.

The interest of the respondent under her grandfather's will was of the value of about 13,755*l.* or thereabouts, producing an income of nearly 470*l.* net. Her interest under the marriage settlement of her parents, the survivor of whom (her mother) died on November 2, 1928, was of the value of 6235*l.* or thereabouts, producing an income of nearly 325*l.* net.

In addition to her interests involved in the settlement the respondent was entitled on her mother's death under a voluntary settlement made by her parents dated May 22, 1923, to a life interest without power of anticipation in a moiety of the value of 2450*l.*, producing a net annual income of 120*l.*, of the trust funds of the latter settlement. Under the will of her father the respondent took a life interest, also without power of anticipation, in a share of the residue producing about 1013*l.*, and a further amount of income derived from shares in a company variously estimated according to contingencies at 3834*l*., 940*l*. or 1697*l*. On November 29, 1928, the respondent assigned her interests under her father's will and the settlement of December, 1927, to Barclays Bank as security for advances. On December 4, 1929, the amount of these latter outstanding was 1743*l*. By a deed poll dated December 7, 1928, the respondent declared that her income under the settlement of December 30, 1927, should be for her separate use without power of anticipation.

The total available income of the petitioner was reported to be 1728*l*. till 1938, when it would fall to 1330*l*. per annum.

A decree nisi was pronounced in the suit on March 26, 1928, and made absolute on October 22, 1928, and on December 12, 1928, the respondent married Hugh Woodward, the co-respondent in the suit.

On November 6, 1928, the petitioner filed a petition for the settlement of the respondent's property under s. 191, sub-s. 1, of the Judicature (Consolidation) Act, 1925. On June 17, 1929, leave was given to amend this petition by claiming relief under s. 192 of the same Act by way of the application of property settled by a marriage settlement as well as under s. 191, sub-s. 1. On June 25, 1929, there was a consent order that the amended petition be treated as a petition under the later section.

On June 27, 1929, the petitioner by leave filed a petition for the maintenance of the children of the marriage. The registrar, to whom the petitions were referred, reported on December 24, 1929, that the settlement of December 30, 1927, was such a post-nuptial settlement as could be dealt with under s. 192, and that the restraint on anticipation imposed by the deed poll of December 7, 1928, should be discharged. The report recommended that the settlement should be varied by extinguishing all rights thereunder of the respondent as if she were dead, that subject to the rights of Barclays Bank the trustees should be directed to pay the income settled to the petitioner or the testamentary guardian to be appointed by him for the maintenance and advancement of the children of the dissolved marriage till they should attain the age of twenty-one, and on their attaining that age the corpus and income should be in trust for them absolutely in equal shares and that there should be no order on the petition for maintenance.

Counter-notices of motion were given by the petitioner to confirm the report and alternatively that the respondent be ordered to execute a settlement of her property for the benefit of the petitioner and the children or either of them, and by the respondent to set aside the report.

Bateson J. dismissed the husband's motion on the ground that the settlement was not a post-nuptial settlement within the meaning of s. 192. It was in his opinion not a settlement on the wife in her character as a wife, nor was it with reference to the married state of the spouses. It was a settlement upon the wife for herself and for any children that she might have in the future, and with power to appoint to any husband she might take, made at a time when she knew perfectly well that the only possible person that she at that time could think of benefiting would not be the husband who had not yet obtained his decree absolute, but the new husband whom she intended to take as soon as she possibly could.

The husband appealed. The appeal was heard on March 24, 25, 1930.

Sir Patrick Hastings K.C., *Bayford K.C.* and *Bush James* for the appellant. The main point on this appeal is whether the settlement executed by the wife on December 30, 1927, is a post-nuptial settlement within the meaning of s. 192 of the Judicature (Consolidation) Act, 1925. That section re-enacts the provisions of s. 5 of the Matrimonial Causes Act, 1859, and s. 3 of the Matrimonial Causes Act, 1878.

It has been held in a number of cases that s. 5 of the Act of 1859 (now s. 192 of the Act of 1925) should receive a wide interpretation. In *Stone* v. *Stone* (1) the Judge Ordinary said: "I am not prepared to say that the separation deed was not a post-nuptial settlement within the meaning of that

(1) (1864) 3 Sw. & Tr. 372, 373.

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section [s. 5]; undoubtedly property was settled, and I think the section should be liberally construed." In *Worsley* v. *Worsley* (1) it was held that, all deeds whereby property was settled upon a woman in her character as wife, and to be paid to her whilst she continued a wife, came within the scope of s. 5, and that the Court had power to deal with them. In that case the Court held that a separation deed was a post-nuptial settlement: see also *Clifford* v. *Clifford.* (2) *Hubbard* v. *Hubbard* (3) was the case of an assignment by the husband to a trustee of a leasehold house upon trust to assign it to the wife and it was held that the assignment was not a settlement within s. 5. The case has therefore no bearing upon the present. In *Blood* v. *Blood* (4) it was again laid down by Gorell Barnes J. that the meaning of the words of s. 5 should not be narrowed in any way. In *Hodgson Roberts* v. *Hodgson Roberts* (5) it was held that the main object and intent of the Legislature in giving the Divorce Court power to vary marriage settlements was to place the parties in the same position, as far as possible, as if the marriage had not been put an end to through the fault of one of them. That case does not afford any assistance in the present case. In *Churchward* v. *Churchward* (6) it was held that the Court could vary a settlement in such a way as to override the restraint upon anticipation. The case also shows that the Court will give the widest possible construction to the words of the section. *Loraine* v. *Loraine* (7) is important under s. 191 of the Act of 1927 as showing that on an application to order a settlement of the wife's property the Court will refuse to interfere with the provisions of the will of the wife's father. *Morgan* v. *Morgan* (8) shows that the Court has jurisdiction to deal with a settlement notwithstanding the existence of a restraint on anticipation. In *Hargreaves* v. *Hargreaves* (9) it was held that a settlement of the property of either spouse not made in contemplation of any particular marriage, but giving the spouse power to

(1) (1869) L. R. 1 P. & M. 648.
(2) (1884) 9 P. D. 76.
(3) [1901] P. 157.
(4) [1902] P. 78, 82.
(5) [1906] P. 142.
(6) [1910] P. 195.
(7) [1912] P. 86.
(8) [1923] P. 1.
(9 [1926] P. 42).

appoint an interest to any future wife or husband was not an ante-nuptial settlement within s. 192 of the Act of 1925.

In *Bosworthick* v. *Bosworthick* (1) a bond given by the wife to secure a present payment of an annuity to the husband was held to be a post-nuptial settlement within s. 5 of the Act of 1859 and s. 192 of the Act of 1925, and that the Court had power to deal with it and discharge it.

In *Prinsep* v. *Prinsep* (2) the settlement in question was not a settlement by a spouse at all but by the mother of the husband after the marriage.

In the present case the settlement was made during the existence of the marriage by the wife, who therein describes herself as the wife of the husband, on herself for life and after her death on her children. It is submitted therefore that the settlement was made by the wife in her character as spouse and is a post-nuptial settlement within the meaning of s. 192. If the divorce proceedings had been abandoned and the wife had returned to the husband it could not then have been contended that the settlement was not a post-nuptial settlement.

In *Hargreaves* v. *Hargreaves* (3) there was no marriage in contemplation at the date when the settlement was executed and therefore it could not be said that the settlement was an ante-nuptial settlement. Here the settlement was made by one of the spouses during the marriage for the benefit of herself and her children. On its terms, therefore, it is submitted that the settlement is a post-nuptial settlement.

Grant K.C. and *H. W. Barnard* for the respondent. In construing s. 192 some limitation must be placed upon the words "nuptial" and "settlement" in the section. Thus in *Hubbard* v. *Hubbard* (4) it was held that an assignment of a house by the husband to a trustee to assign to the wife was not a settlement within the section, and that the word "settlement" must be given its legal meaning. The crucial word in the section is the word "nuptial," and it is submitted that the settlement in question is not a "nuptial" settlement.

(1) [1927] P. 64.
(2) [1929] P. 225; ante, p. 35.
(3) [1926] P. 42.
(4) [1901] P. 157.

To come within that description the settlement must be by the wife in her character as wife: *Worsley* v. *Worsley*. (1) The cases show that a settlement is not a nuptial settlement merely because it provides for events or children which come into being by reason of the marriage. A settlement which provides for the wife and children is not "nuptial" unless it refers to the marriage of the spouses. There must be an intention on the part of the settlor to provide for the husband or wife and the children of the marriage. It does not necessarily follow that a settlement made after the marriage is a post-nuptial settlement. It must refer to the spouses in connection with the marriage state. Merely referring to the settlor as the wife is not sufficient. A settlement by a husband of his own property on himself during the marriage and afterwards on a stranger would not be a post-nuptial settlement, as it would have no reference to the marriage. The settlement would not be a settlement by the husband as husband but as an owner of property. As a settlement by a man on himself for life with remainder to his children is not an ante-nuptial settlement so a similar settlement after marriage would not be a post-nuptial settlement, because there is no reference to marriage.

In determining the question whether a settlement is a post-nuptial settlement you are entitled to take into consideration matters outside those stated in the document itself. Here the settlement was made by a lady of her own property on herself and then on all her children. Such a settlement had no relation to the marriage state and therefore was not a nuptial settlement. It was merely an ordinary settlement by a person of her own property. There must be some indication in the deed that one party intended to benefit the other as a spouse. Here the intention of the wife was to benefit herself, not as a spouse but as a divorced woman. Having regard to the dates and the position of parties the settlement cannot be regarded as a settlement between the persons who were the parties to the marriage which was the subject of the decree. A nuptial settlement is a settlement of which the nuptials are the causa causans. The present settlement is an ordinary settlement by an individual who happens to be a married woman on herself and children but not as a spouse, and is not therefore a nuptial settlement.

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(1) L. R. 1 P. & M. 648, 651.

Gover K.C. and the *Hon. Victor Russell* for the trustees of the settlement. The question is whether the settlement is a settlement on the parties whose marriage is the subject of the decree. Can the settlement properly be described as a settlement with reference to the marriage of Colonel and Mrs. Melvill? The law on the subject is accurately summarized by Hill J. in *Prinsep* v. *Prinsep*. (1) The mere fact that the wife in the present case provided for her two children of the marriage as well as for future children does not make the settlement a settlement on the marriage of Colonel and Mrs. Melvill. A settlement by a widow on her children by a previous marriage could not be said to be a settlement in contemplation of a subsequent marriage. You must look beyond the instrument and have regard to the surrounding circumstances. The question here resolves itself into one of fact. It is submitted that looking at all the circumstances in this case the object of the settlement was not to provide for the then existing marriage but for a future marriage, and that the settlement is therefore not within s. 192.

Sir Patrick Hastings K.C. was not called upon to reply.

LORD HANWORTH M.R. This is an appeal from an order made by Bateson J. on January 27 of this year whereby he refused to confirm a report which had been made by the registrar with reference to a settlement to which I must refer later, and ordered that the report of the registrar must be set aside, and the petition so far as regards variations of the settlement under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, be dismissed.

The facts out of which the proceedings have arisen are these. On July 30, 1921, Colonel Melvill, as he is now, married his wife, Irene Melvill. There were two children of the marriage, a son named Peter aged eight years and a daughter named Chloe aged six years. On May 27, 1927, a petition for divorce was lodged by the husband, and it proceeded in the ordinary course as an undefended suit, and it was set down for trial in the Undefended List on December 16, 1927. On December 30, 1927, Mrs. Irene Melvill made the settlement which is here in question. On March 26, 1928, a decree nisi was made upon the petition for divorce, which in fact was an undefended suit, and on October 22 in the same year that decree nisi was made absolute. It is also material from the point of view of the interest taken by Mrs. Melvill, that Mrs. Melvill's mother died on November 2 of this same year, 1928. On November 6 the petition was lodged to order a settlement of the former wife's property under s. 191 of the Judicature (Consolidation) Act, 1925. On December 7, 1928, a deed poll was executed by the former wife, under which she directed and declared, that in the event of a marriage taking place which was intended shortly to be solemnized between herself and the co-respondent, the income arising from the property subject to the trusts of the settlement which had been executed by her on December 30 in the previous year, was to be paid to her during her life without power of anticipation; and that so-called deed of declaration was made supplemental to the settlement of December 30, 1927, the settlement which is in question in the present proceedings. On December 12 Mrs. Melvill married the co-respondent. In the following year, on June 25, the petition was amended so as to include the claim, under s. 192, to vary the settlement. Upon that petition the registrar made a report dated December 24 in which, after reciting the facts which I have somewhat summarily detailed, he said: "(1.) It is submitted that the settlement of December 30 is such a post-nuptial settlement as can be varied; and (2.) that the restraint of anticipation imposed by the deed poll of December 7, 1928, be discharged, and that the settlement of December 30, 1927, be varied" in five different ways which were set out in the report.

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(1) [1929] P. 225, 232.

The next proceeding was that a motion was made before the learned judge on behalf of the petitioner to confirm the report as to the variation of the settlement. When that motion came before Bateson J. he came to the conclusion that the settlement of December 30, 1927, was not such a one as came within s. 192 of the Judicature (Consolidation) Act, 1925, and he held that it was not a settlement on the wife in her character as a wife, nor was it in reference to their married life. It was a settlement upon the wife for herself and for any children she may have in the future, and with power to appoint to any husband she might take, made at a time when she knew perfectly well that the only possible person she at that time could think of benefiting would not be the husband who had not yet got his decree absolute, but the new husband whom she intended to take as soon as she possibly could; and holding that view, he decided that the report of the registrar could not stand, and therefore dismissed the motion. It is from that judgment that the appeal is taken to this Court.

The settlement of December 30, 1927, dealt with a number of different funds to which Mrs. Melvill at its date was entitled or prospectively entitled. The learned judge, who has set them out with great accuracy, says: " At that date, the wife was entitled to certain funds: (1.) Under her parents' marriage settlement on her mother's death absolutely; (2.) Under the grandfather's will also on her mother's death absolutely; (3.) Under a voluntary settlement made by her parents on her mother's death to a small life interest without power of anticipation; and (4.) Under her father's will to a life interest in a much larger sum also without power of anticipation." That settlement dealt with the first two of these funds. It is made between Irene Melvill, who is described as wife of Lieutenant-Colonel James Lister Melvill, as settlor, and Irene Mary Diana Simmons, of 41 Cadogan Gardens, widow, and Francis Covell, solicitor, who were the trustees, and it recites: " Whereas the settlor had as issue two children and no more, namely, Peter and Chloe "—to whom I have already referred—" Now this deed witnesseth that in consideration of the natural love and affection of the settlor for the said Peter and Chloe," the settlor assigns those two first sums to the trustees, and there is a direction that the trustees are to pay the income to the settlor during her life, and after her death are to stand possessed of the capital and future income of the trust fund in trust for all or any the children or child of the settlor who being male attain the age of twenty-one years, or being female attain that age or marry; if more than one, in equal shares; and by clause 6 it is provided that the settlor may by will or codicil appoint that the income or any part not exceeding a moiety of the trust fund shall from and after the death of the settlor be paid to any husband who may survive her during his life. It is plain, therefore, upon the face of the document that the settlor is described as a wife, that there was issue, of the marriage by which she became a wife, two children; but it is also plain that after reserving a life interest to herself, the future income of the trust fund was to be held in trust for all the children of the settlor, whether they were issue of the then existing marriage, or whether they should be children by some subsequent marriage; and it is also plain that the provisions in clause 6 gave a power to appoint to any husband, not merely the husband who was recited as being the husband of the settlor in the opening words of the settlement.

It is contended that that settlement is not a settlement within the purview of s. 192. Sect. 192 replaces a section which was originally to be found as s. 5 of the Matrimonial Causes Act, 1859, which was in these terms: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit." Attention to the words of the section makes it plain that at that time it was contemplated that the section was to operate in cases where there were children of the marriage, and children of whom the spouses were spoken of as their respective parents. By an amendment which is s. 3 of the Matrimonial Causes Act, 1878, it is provided that the Court may exercise the powers vested in it by the provisions of s. 5 of the Act of 1859 notwithstanding that there are no children of the marriage. Sect. 192 of the Judicature (Consolidation) Act, 1925, is in these terms: "The Court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the Court thinks fit, and the Court may exercise the powers conferred by this sub-section notwithstanding that there are no children of the marriage." I think it is plain that the interpretation to be given in that section to the words "parties" or "children," is the interpretation which arises from the application to the section of s. 1 of the Interpretation Act, 1889, where it is provided that unless a contrary intention appears, the words in the plural shall include the singular. I think it would be idle to suppose that the words "for the benefit of the children" do not include benefit of the children or child of the marriage; and equally I think, when one comes to the later words "for the benefit of the parties to the marriage" they must mean the parties to the marriage or either of them, introducing the singular, and the same principle applies to the earlier part of the section. The section would appear to embrace a settlement made on the parties or either of them whose marriage is the subject of the decree. I merely say that because at one time, if I understood the argument, it was suggested that it might be held that unless the settlement was made on both the parties it would not be a settlement within the section. It is said that one must construe the settlement from what are called the surrounding circumstances, and take into account what is the substance of the matter; in other words, that particularly in the present case one ought in some way to treat this settlement as having been made for the purposes of the future intended marriage between the co-respondent and the guilty wife, and not as being one which was made by her as the wife of Colonel Melvill, although at that time she was in fact the wife of Colonel Melvill. I have great difficulty in accepting that view. It appears to me that one must apply the ordinary canons of construction to this document. One must take the document as it stands and see what it does, and derive its purpose from its terms; and that one cannot give a different interpretation or meaning to its terms by reason of some outside circumstances which are to be collected from other sources.

The interpretation which is to be given to the section has been laid down in a number of cases as a wide interpretation. In *Worsley* v. *Worsley* (1) Lord Penzance says: "The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the Court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife." The same interpretation of the section was adopted by Gorell Barnes J., as he then was, in *Blood* v. *Blood* (2), where he says: "Those words are extremely wide, and I am anxious that they should not, by any construction the Court may put upon them, be narrowed in any way." In *Churchward* v. *Churchward* (3) Sir Samuel Evans P. says: "I adopt in the fullest sense, both in the letter and the spirit, the words of Gorell Barnes J. in *Blood* v. *Blood*. (2)" He then quotes the passage to which I have just referred, and adds: "To narrow them would be undesirable for this reason: the various circumstances which come before the Court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the Court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case." Lastly, in *Bosworthick* v. *Bosworthick* (1) the same point arose, and Romer J. (as he then was) said: "What we have to do is to consider the meaning of the word [settlement] in these particular sections. We have had numerous authorities cited to us, going as far back as 1861, and amongst them an authority which is binding on this Court, and in my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the Legislature." I agree entirely with those words.

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(1) L. R. 1 P. & M. 648, 651.
(2) [1902] P. 78, 82.
(3) [1910] P. 195, 197.

At the same time there have been cases which show that there are some so-called settlements which would fall outside the purview of the section. Thus in *Loraine* v. *Loraine* (2) it was held that the Court cannot affect the will or the terms of the will of the wife's father; and in *Hargreaves* v. *Hargreaves* (3) there was a settlement of property made by a young man aged twenty-one some weeks before he was married, and under which there was a power of appointment. He did in fact get married shortly after he had made the settlement, and he did exercise the power of appointment, because he appointed a yearly sum of 500*l*. to his wife for her life. It was claimed that the original settlement under which the power of appointment was made was such a settlement as fell within s. 192; but it was held not to be so because in fact it was not made in view specifically of the marriage, although it may have been contemplated that a marriage would shortly take place.

It is to my mind not possible, nor would it be wise, to attempt to give a precise definition of the settlements that

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(1) [1927] P. 64, 72.

(2) [1912] P. 222.

(3) [1926] P. 42.

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come within the purview of this section. I think the Court ought always to bear in mind the words which have been used by Gorell Barnes J., and approved by Sir Samuel Evans P., that the section is intended to be a wide one and embraces a large number of settlements which might not appear to be settlements in the strict terms of a conveyancer, because the section is intended to operate in a number of cases not easy to catalogue under any definition. But we have it stated in *Bosworthick* v. *Bosworthick* (1) that there may be a settlement, although it does not involve the settlement of property, or a charge of property for successive interests. In that case there was an annuity secured by a bond, and it was held to be a settlement within the terms of the section.

With those observations upon the ambit of the section I come back to the question whether or not this particular settlement falls within it. I do not think it possible to accept the view that one must ascertain the intention of the lady from exterior circumstances. I think one ought to look at the terms of the settlement itself. It contains, as I have already pointed out, some history in it. It shows that she was the wife of Lieutenant-Colonel James Lister Melvill; it records the fact that there had been issue of that marriage, and the issue of that marriage are included, but not exclusively in clause 4, under which a trust is established for the children of the lady. It is quite true that Colonel Melvill is not specifically mentioned as her husband under clause 6, but the wider term used is " any husband " making it possible, if not certain, that a new husband is intended; but nevertheless it does make a settlement of property, the wife of the existing marriage being the settlor, recording the marriage, and the issue of that existing marriage being some, or included among, the beneficiaries. Under those circumstances I find it impossible to exclude that settlement from the terms of s. 192. It is a settlement post-nuptial, made after the marriage with Colonel Melvill had taken place and after there had been issue of the marriage; and the section is required to give power to the Court, whose authority cannot be circumscribed by the parties, to make such orders for the benefit of the children of the marriage (that would be of the Melvill marriage) or of the parties to the marriage, as it thinks fit.

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(1) [1927] P. 64.

It has been said, and strenuously argued by Mr. Grant, that one ought to look at the word "nuptial," and if you look at the nuptials of Colonel Melvill and Mrs. Irene Melvill, the nuptials which ought to be contemplated are the future nuptials which, if and when the decree absolute is made, it may be possible for Mrs. Melvill to enter into with the co-respondent. Rejecting the view that one is to find the intention aliunde and outside the settlement, I have come to the conclusion that this settlement is within the terms of s. 192, that it is made by one of the parties to the then existing marriage and in favour of the children of the marriage, and thus is a post-nuptial settlement within the meaning of the section. It is unnecessary, as I say, to go further for the purposes of this case. I think it much wiser to leave other cases as they severally may be decided to afford illustrations of the ambit of the section. But I am not prepared to follow the learned judge, with all respect to him, in cutting down the section so far as to declare that this settlement of December 30, 1927, does not fall within its scope.

For these reasons the appeal will be allowed, and the matter must go back to be determined in the ordinary course. We are not asked to do more than to deal with this point, and Bateson J., having got rid of the difficulty which embarrassed him, will be free to deal with the matter as he thinks right, in his discretion and with his experience.

GREER L.J. I also am of opinion that this appeal must be allowed. We are invited by Sir Patrick Hastings to issue a pronunciamento as to the meaning of s. 192 which would be available to future litigants in the Probate and Divorce Court, where the facts may be somewhat different from the facts of this case; and if it had been necessary to give a judicial definition of the compound word "post-nuptial" in s. 192, I should have thought it necessary, as far as I was concerned, to take time to consider the position and to exercise more care than I can do at the present time in selecting the appropriate words to make a definition of the words which we have to consider in this case. But without going so far as we were invited to go by Sir Patrick Hastings for the appellant, I have come to the conclusion that whatever may be the exact scientific words which should be used in defining the term " post-nuptial settlement " in this case, the settlement under consideration was within the words of s. 192. As my Lord has pointed out, it has been said by high judicial authorities over and over again that a liberal construction should be put upon the section; and I understand that to mean this, that a wide interpretation should be given to the words, having regard to the objects of the section, and if the words admit of application, by any reasonable meaning of the words, to the facts of the particular case, then the powers of the Court given by s. 192 ought to be considered exercisable, even though some criticism may be passed from the point of view of general knowledge of what the circumstances were under which the deed came into operation.

In this case the settlement came into operation in this way: the wife, for some reason or other, formed a very strong affection for a man who was other than her husband. The husband was ready to forgive the wife and to take her back again if she would come, but she declined to come, infatuated as she was at the time by the man who was afterwards made co-respondent to the divorce proceedings. As the French poet says: " Souvent femme varie "; it does not follow that strong passions of that sort will last for ever, and it was quite conceivable before divorce proceedings took place, and conceivable even after the case had been set down as an undefended case, that the parties might have come together again. It was also by no means certain, having regard to the state of mind of the husband, that he would finally cut the knot of marriage by asking for the decree to be made absolute. Under those circumstances the deed was entered into. It did in fact settle property on a lady who was the wife of the other party to the proceedings during the continuance of their marriage, however long or however short that might be; and not only did it do that, but it provided for the issue of the marriage; it seems to me in these circumstances that a definition of the words "post-nuptial settlement" which would not include a deed of that kind which might operate for many years, and which must operate for many months, one of the objects of which, as stated in the document itself, was to enable the lady to give effect to the natural love and affection she had for her two children by her husband would, in my judgment, put such a narrow construction on the meaning of the words as the judges have said ought not to be put upon them. One can conceive many circumstances which may make it reasonably probable, if not absolutely certain, that at the time a settlement is executed the marriage might only last for a short time. The husband at the time of the settlement might be in such a state of health that it might be quite certain he could not live for more than nine months or a year, and the fact that the wife might settle her property for the very reason that her husband could not live for more than nine or twelve months, and the marriage therefore could not continue after that period. Could this be successfully urged as a reason why the settlement should not be regarded as a post-nuptial settlement? It seems to me the mere fact that there was a reasonable probability that the marriage would end in a short time by the decree of the Court does not prevent the settlement which was made by one of the parties to the marriage on herself, and after her death upon her children, including these two children of the existing union for whom she expressed her natural love and affection, from being a post-nuptial settlement within the meaning of the words of the section. I am not at all certain that it was not open to the Court originally to have decided that "nuptial" merely means "marriage," and that "post-nuptial" merely means "after marriage." It is quite true that in one or two cases relating to ante-nuptial settlements it has been held that a settlement made before

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marriage is not within the purview of s. 192, merely because it was a settlement before the marriage of the parties. There is no doubt about that now. It was so decided in *Worsley* v. *Worsley* (1) followed in *Hargreaves* v. *Hargreaves* (2) and in *Prinsep* v. *Prinsep*. (3) But the questions for consideration which relate to an ante-nuptial settlement seem to me not necessarily the same as those which are material to consider when we are dealing with a post-nuptial settlement, because an ante-nuptial settlement may have no reference whatever to the marriage which is to take place. It may be as it was in all these cases, a document which will operate if there never is a marriage at all, or a document which will operate if there never was going to be, and never happened, the particular marriage which is before the Court, when they come to apply the provisions of s. 192 ; and in those cases one can quite see the settlement which qua marriage or qua the particular marriage is, as it were, in the air, cannot be regarded as an ante-nuptial settlement. But you cannot have a settlement after a marriage which has not some relation to marriage if it settles property on one of the parties to the marriage, and still more if it settles property on the children of the marriage, one of the main objects of marriage being, according to the words in the Prayer Book, the procreation of children.

For these reasons, without laying down any general rule, I agree that this appeal should be allowed ; but I should like to say this : that for my own part I was very much impressed by the wider proposition which was put forward by Sir Patrick Hastings. As I understand his argument it was this, that any settlement is a post-nuptial settlement, if it is a settlement during marriage by one of the parties, which gives some interest to either of the spouses or their offspring. That is a proposition which appeals to me as a fair and reasonable representation of what the section means. As I have said, it is not always wise without full consideration to say more than is necessary for the decision

(1) L. R. 1 P. & M. 648. (2) [1926] P. 42.
(3) [1929] P. 225.

of the particular case before the Court, and in this particular case I have no doubt whatever that this settlement of December 30, 1927, was a post-nuptial settlement, and therefore the learned judge, influenced as he necessarily was by the dicta of other judges of the Division of which he is an ornament, was wrong, although it was natural enough for him to take the view he did, after the expressions of opinion which have been given by previous judges of that Division.

ROMER L.J. I agree that this appeal must be allowed. I have no intention of expressing any definite opinion as to the conveyancing ambit covered by s. 192 of the Judicature Act of 1925. I can only say this, that as at present advised I am more attracted by the definition given by Hill J. in *Hargreaves* v. *Hargreaves* (1) than I am by the wider contention which I understood Sir Patrick Hastings to put forward. Hill J., referring to s. 192, says (2): "This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement, that is, a settlement made in contemplation of" —that is referring to ante-nuptial settlements—"or because of, marriage"—that is referring to post-nuptial settlements —"and with reference to the interests of married people, or their children. Nobody has referred me to any case in which it is said it has any wider meaning. The judgment of the Court of Appeal in *Loraine* v. *Loraine and Murphy* (3) shows that it has not a wider meaning than that." However, as I say, I do not intend to express any concluded opinion upon the matter, and for this sufficient reason, that in my opinion without any question this particular settlement of December 30, 1927, is a post-nuptial settlement within the narrow meaning of that phrase. When one looks at the settlement one sees that the property of the wife is brought into settlement and settled upon trusts which are frequently found in ante-nuptial settlements of the wife's property. It is true that no life interest is given to the husband except

(1) [1926] P. 42.
(2) [1926] P. 42, 45.
(3) [1912] P. 222.

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through the operation of a power of appointment for that purpose given to the wife. That often occurs in marriage settlements of the wife's property. It is true that the trusts after the life interest are not confined to the children of the particular marriage, but the children of any marriage that the wife may contract. That is not unusual in ante-nuptial settlements of the wife's property. If at the time this settlement was executed Mrs. Melvill had been living in friendship with her husband, if no quarrel had taken place between them, no divorce proceedings had been taken or threatened, no one could doubt that this was a post-nuptial settlement; and the only ground on which it can, it seems to me, be argued that this is not a post-nuptial settlement is that the motive of the wife in entering into it was not the intention to provide for her then husband as her husband at all, or for her children as the children of the marriage, or for herself as the wife of Colonel Melvill, but for the purpose of providing for the event of her subsequent marriage with the gentleman who was the co-respondent in the divorce proceedings which were then pending. In my opinion, one is not entitled to regard the motive with which settlements are entered into; and in deciding the question whether a settlement is an ante-nuptial settlement or a post-nuptia settlement, that question must be decided by reference to the settlement alone, and not by any consideration of the motives which prompted it. On that point I agree with what was said by Hill J. in *Prinsep* v. *Prinsep* (1), that "On the question whether a settlement is a settlement within s. 192, the motive of the settlor seems to me immaterial, except so far as it is given effect to by the terms of the deed."

For these reasons I agree that this appeal should be allowed, with the consequences which have been mentioned.

LORD HANWORTH M.R. Appeal allowed with costs to be paid by the lady out of her separate estate.

Appeal allowed.

Solicitors for respondents: *Withers & Co.*

Solicitors for appellant: *Guedalla, Jacobson & Spyer.*

W. I. C.

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(1) [1929] P. 225, 236.

1930
Jan. 13 ;
March 3.

In the Estate of DINSHAW.

Probate—Practice—Power of Attorney by several Executors to take Administration with Will and Codicils annexed—Fresh Attorneys of surviving Executor—Revocation of Grant of Administration to original Attorney—New Grant to fresh Attorneys.

Several executors out of the jurisdiction gave a power to an attorney to take administration with a will and codicils annexed without reference to survivorship amongst the executors. The attorney took a grant of administration and partly administered the estate. The surviving executor appointed fresh attorneys. The Court revoked the grant to the original attorney and made a fresh grant to the fresh attorneys.

Motion for revocation of grant of administration to attorney of several executors and for fresh grant to attorneys of surviving executor.

Edalji Dinshaw, late of Karachi, died on May 9, 1914, leaving a will dated November 10, 1911, with two codicils, of which he appointed four executors, his sons Nadirshaw and Framroze, K. N. Spencer and Nanabhai Chanjibhai. On August 13, 1915, probate was granted to the son Nadirshaw, power being reserved to the other three executors. On November 17, 1922, Nadirshaw died, having survived Nanabhai Chanjibhai. On August 22, 1923, a grant of administration with the will and codicils annexed was granted to Herbert Vincent as attorney for the two surviving executors, Framroze and Spencer. Spencer died on February 2, 1928. Framroze, the last surviving executor, was residing in India. There remained unadministered and within the jurisdiction part of the estate, a freehold house of the value of 1000*l.* or thereabouts. On a proposed sale of this asset the attorney was advised that he could not show a title under the grant of administration of August 22, 1923, owing to the death of Spencer. It was then sought to revoke the grant and obtain a fresh one to the attorney on behalf of Framroze, the surviving executor. A fresh grant was refused in the Registry on the ground that according to the established practice the existing grant was good and operative notwithstanding the death of Spencer. Framroze, having given a fresh power of attorney to the former attorney and another, now moved to revoke the existing grant and for the issue of a fresh grant to those persons as his attorneys.

T. Bucknill for the motion. *Pipon* v. *Wallis* (1) is an authority for revoking the grant to the attorney of two executors on the application of the survivor of them.

[LORD MERRIVALE P. referred to *Adams* v. *Buckland.* (2)]

In *Tasker* v. *Shepherd* (3) it was held not to be a breach of contract for a surviving partner to refuse to continue the employment of an agent engaged for a term certain by two partners. In *Brace* v. *Calder* (4) a dissolution of a partnership was held to operate as a dismissal of its agent.

[He also referred to The Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 124, sub-s. 2.]

[LORD MERRIVALE P. referred to *Life Association of Scotland* v. *Douglas.* (5)]

THE PRESIDENT (LORD MERRIVALE). It is necessary that this case should be examined with some care, because other matters, relating to the functions and powers of legal personal representatives and the general interest of the community in respect of property on succession upon death, may be held to be involved. That being so, and there having been, as was considered, a course of practice which under the state of the law when that practice was settled might be thought to have governed this case, those who are responsible for the due application of practice decided that the matters here in question called for examination by the Court before any special Order should be made.

The facts are comparatively simple in their character and quite likely to recur with or without variations. A testator in India who had property in this country by his will nominated four executors, two of whom died, and the two survivors made a power of attorney under which they authorized their solicitor to apply for and obtain letters of administration in this Division of the High Court, and letters of administration

(1) (1753) 1 Lee, 402.
(2) (1705) 2 Vernon, 514.
(3) (1861) 6 H. & N. 575.
(4) [1895] 2 Q. B. 253.
(5) (1886) 13 R. 910.

were duly granted to the agent appointed under this joint power of attorney. That state of things subsisting, and real property of the testator remaining undisposed of in this country, one of the two executors dies, and there then comes the question whether there is a grant of personal representation to the testator which survives to the person named, the administrator under the letters of administration, notwithstanding the death of the executor, one of his principals. I am not at all surprised that when questions arose as to dealing with real property in this country it was asked whether this administrator under a power of attorney with his limited right of administration could be a grantor of that real property or a possible grantor, and whether the grant would inevitably be accepted and would inevitably stand good. Of course, if the case were one of a casual dealing with chattels any doubt might be set at rest within a limited period : as to realty it is a matter which might be raised and reraised for a long time to come. Very natural anxiety was shown by those who had to consider that question lest the power to deal with the English realty of the testator should be found not to be vested absolutely and certainly in a grantor on letters of administration under a power of attorney by joint principals when one of the principals had died. Counsel in support of the motion discussed some authorities which deal with the matter, and there are certain well decided principles relating to this question. There is the case of *Pipon* v. *Wallis.* (1) Sir George Lee, it must be remembered, was in a sense a predecessor of the President of this Court, in that the jurisdiction which is now vested here was vested in the Court of which he was head. The case of *Pipon* v. *Wallis* (1) in effect decides this, that where there is a grant to an attorney for the joint use and benefit of two executors during their joint lives, his power is limited in its effect to the period during which neither of the two principals shall have applied for and obtained probate, and that the attorney is displaceable by the surviving principal. That does not indicate a self-contained authority in either one attorney or two attorneys, where there are two principals. Then there is the case of *Adams* v. *Buckland* (1), where the Lord Keeper (William Cowper) in 1705 contrasted the position of joint administrators under a joint grant to two administrators under a power of attorney to two attorneys, and drew a distinction. He said a joint grant of administration to two administrators would survive, because they have an office which survives, but where the matter is the power of agents under a power of attorney to joint agents, that does not survive. They have only an agency.

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(1) 1 Lee, 402.

Those two cases seem to me, both of them, to touch this case, and show the prudence which has been exercised in requiring that the matter should be specifically dealt with before the grant of personal representation is held, at any rate, as far as this Court is concerned, to be sufficient as it stands.

There are other cases. There is the Scottish case to which I have called attention: *Life Association of Scotland* v. *Douglas.* (2) That seems to touch this case. What was held by the Scottish lawyers in that case—which is not likely to differ much from the view taken, at any rate, in old times in probate jurisdiction in this country, because the law was then in both countries founded on the Civil law—was that where there are joint principals and the functions entrusted to the agent remain undischarged at the death of one of them, the powers of the agent lapse. That is not an authority. I mention the case because happily, after all, this is not a question of determining the right of parties after action has been taken; it is a matter of determining what is the right course to take now in order to avoid future difficulty.

The matter stands in this way. Of the two executors who appointed their attorney as agent one has died, the other has revoked the grant as of a subsisting agency. He could have revoked it during the lifetime of the first. As I see the facts, I think he has effectually revoked it now. In these circumstances, except for acts done before the revocation, all the powers under the letters of administration have gone.

(1) 2 Vernon, 514.

(2) 13 R. 910.

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DINSHAW, *In the Estate of.*

The President.

The section referred to in the Law of Property Act bears upon that topic; it is not necessary to refer to it. Then what is left to decide is the exact form which the order of the Court should take in a case of this kind, and I think the exact form should be this: That the Court taking notice of the revocation by Mr. Framroze of the power granted to the administrator pro tempore who was administrator for him and his co-executor jointly, the grant of that administration on behalf of the two executors should be revoked, that is, it should be brought in to be cancelled, and that being done, the way is clear for a new grant that would be made in the ordinary course in the Registry as a matter of course. The old grant being gone there is now a power of attorney of the surviving executor in which he appoints the two persons named in the power to take administration on his behalf, and the sequel to the order revoking the old grant of administration will be to make the new grant to the two attorneys on behalf of the absent executor, and with usual provisions relating to a grant made on behalf of an absent executor.

I think that disposes of the whole matter.

Solicitors: *Vincent & Vincent.*

R. M. M.

PALIN *v.* PONTING AND ANOTHER.

1930
March 7.

Probate—Will—Evidence of Execution—Printed Form—Due Execution of Form—Dispositive Provisions on further Page not executed—Reference on executed Page—Absence of attesting Witnesses—Affidavit of attesting Witness on previous Application for Probate in common Form.

On the margin of the first page of a will on a printed form, duly executed and attested at the foot of the page, occurred the words, "See other side for completion." On the second page under the words, "Continuation from the other side," there were dispositions of property and a residuary gift without any further execution or attestation :—

Held, that the words, "See other side for completion," had the effect of joining in or interlining the writing on the second page, and that the unexecuted writing should be included in the probate.

On the trial of a probate action in which a will was propounded in solemn form neither of the attesting witnesses could be called. An affidavit by one of them sworn for the purpose of obtaining probate in common form before the commencement of litigation was admitted as evidence of execution and the state of the will when executed.

PROBATE IN SOLEMN FORM.

The plaintiff, Joseph Palin, as executor, claimed probate of the will of Ellen Ponting, deceased, who died on January 26, 1928. The defendants, who were two brothers of the deceased, entered a caveat, and by their defence contested the execution of the will and put the plaintiff to proof of it. The material questions were the admissibility of an affidavit as to execution of one of the attesting witnesses, neither of whom could be found, and the inclusion in the probate of a portion of the will which, as it was contended, was bad for want of execution.

The testatrix made her will on a printed form. The first page of the form contained testamentary dispositions and purported to be duly executed and attested with a printed attestation clause. There was no room for further writing on the page.

In the margin beginning below the middle of the page and written in an upwards direction were the words, "See other side for completion." On the second page of the will were the following words :—

"Continuation from the other side. I also instruct my executor to inform each legatee that they must not dispose of or transfer any of the above holdings without his 'my executor's' permission. My personal possessions such as wardrobe linen and jewellery I desire that my two nieces Maud Hutton and Lilian Francis Palin should deal with these jointly as they think best. My furniture, namely settee, gentleman's wardrobe, three chairs, fourfold screen table etc., together with my piece of land at Minster-on-Sea to my executor Joseph Palin for services rendered. Residue after all just debts have been paid to be divided amongst the legatees or others at the sole discretion of my executor who is fully conversant with my wishes."

This second page of the form was not executed, and neither of the attesting witnesses could now be found, nor could their handwriting be proved. One of them had made an affidavit of due execution when probate was first granted in common form in July, 1929. In this affidavit he deposed that the words, "See other side for completion," and also the words on the second page, were written before execution.

G. C. Tyndale (*Talbot Dyer* with him) for the plaintiff. The words on the second page may be considered as an interlineation, even if not incorporated by the words of reference as we submit that they are.

Bush James for the defendant. The first page of the will alone should be admitted to probate. The unattested words in the margin, "See other side for completion," are not effectual to incorporate the writing on the second page, which is not above the signature. *In the Goods of Birt* (1) is distinguishable. There the words, "See over," with an asterisk with a corresponding mark repeated on the second page of the will followed by the completion of a sentence were held to be an interlineation. There is no case where a large dispositive portion of a will has been treated as an interlineation. In *In the Goods of Dallow* (2), a clause appointing executors written below the testator's signature was held not to be incorporated by the words executors "as hereinafter named" in the body of the will. *In the Goods of Watkins* (3) is to the same effect.

(1) (1871) L. R. 2 P. & M. 214.
(2) (1866) 1 P. & M. 189.
(3) (1865) 1 P. & M. 19.

With regard to the reception in evidence of the affidavit there is no precedent for it in such a case as the present. In *Gornall* v. *Mason* (1) the action was for revocation of probate, and the affidavit of the attesting witness made eight years previously was admitted to show capacity with hesitation on the part of the Court. In *Hayes* v. *Willis* (2) there was evidence of execution aliunde.

Dyer in reply referred to *In the Goods of Thomas Greenwood.* (3) The affidavit is good secondary evidence in the unavoidable absence of the witnesses.

BATESON J. I am satisfied on the evidence that this will as it now stands represents the will of the testatrix and that it was properly executed. On behalf of the defendants, two brothers of the testatrix, it is said that I cannot admit the whole will to probate because the words on the second page are not properly signed by the testatrix nor attested. But it is not disputed that the front page is the will of the testatrix. I think that what is written on the form is all part of one will. The fact that the words, " See other side for completion," were written along the side was due to there being no room for other clauses, and the words on the other side are just as much a part of the will as if they had been interlined in the body of the will. In *In the Goods of Birt* (4) the only persons interested in contesting the will consented, and Lord Penzance said: " It seems to be the better course to look upon these words as an interlineation, for the clause without them would be unmeaning. The testator, at the end of the unfinished sentence, has put a mark (an asterisk) and under a corresponding mark completes the sentence, and he did this before the will was executed. He clearly intended that the words should be introduced where he made the first mark. . . . . I think that these words, although, as written, they follow the signature, must be read in the place in which the testator intended they should be read, and therefore preceding the signature." In that case the real point was that it was an

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(1) (1887) 12 P. D. 142.
(2) (1906) 75 L. J. (P.) 86.
(3) [1892] P. 7.
(4) 2 P. & M. 214.

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Bateson J.

unfinished sentence. So here the words were clearly intended to join in the other clauses which were written on the back of the document. There is not an asterisk, but the words, "See other side," seem to me clearly to indicate what the testatrix intended. In the case of *Greenwood* (1) there was again an asterisk, and a consent. Sir F. Jeune P. therefore allowed words that appeared after the execution to form part of the will. In *In the Goods of Dallow* (2), the will contained a reference to executors "hereinafter named," and the clause appointing executors was written immediately underneath the testator's signature. Sir J. P. Wilde followed his own decision in *In the Goods of Watkins* (3), in which he said: "First, it must be made manifest that the testatrix in the executed paper referred to some papers then in existence; and next, that the papers in question are beyond all doubt the papers referred to." Both these cases referred to the incorporation of other papers, and do not apply to this case. The testatrix intended to include these words as part of her will.

Another question is raised as to the affidavit of the attesting witness being put in when his evidence was not forthcoming. In *Hayes* v. *Willis* (4) Sir Gorell Barnes admitted a similar affidavit to prove a will of the due execution of which there was no serious doubt, and in this he followed Butt J. in *Gornall* v. *Mason*. (5) I have no difficulty in giving effect to what I find on the evidence was the intention of the testatrix, and I pronounce for the whole of the will, including the second page.

The defendants' costs will come out of the estate.

Solicitors for the plaintiff: *H. L. Lumley & Co.*

Solicitors for the defendants: *E. C. Rawlings, Butt & Bowyer.*

(1) [1892] P. 7.
(2) 1 P. & M. 189.
(3) 1 P. & M. 19.
(4) 75 L. J. (P.) 86.
(5) 12 P. D. 142.

R. M. M.

RESTALL *v.* RESTALL.

C. A.
1930
April 29.

Divorce—Nullity of Marriage—Permanent Maintenance—" Conduct of the parties "—Conduct both before and after Marriage—Judicature (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1.

By s. 190, sub-s. 1, of the Judicature (Consolidation) Act, 1925: "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . . . ":—

Held, that the words "conduct of the parties" in the sub-section referred to the conduct both before and after the marriage.

A petitioner having obtained a decree absolute for nullity of marriage presented a petition under s. 190 of the Act of 1925 for permanent maintenance. The respondent in his reply made serious allegations of misconduct both before and after the marriage against the petitioner. The petitioner filed an affidavit in which she dealt with the allegations of misconduct. The registrar refused leave to the respondent to file a rejoinder and directed the allegations in the answer as to misconduct to be struck out. On appeal Bateson J. confirmed the registrar's order and directed the petitioner's affidavit in reply to be struck out.

On appeal:—

Held, that the words "conduct of the parties" in sub-s. 1 of s. 190 referred to the conduct of the parties both before and after the marriage, and that in exercising its discretion under the section it was essential that the Court should have before it all the relevant evidence of the conduct of the parties both before and after the marriage.

Held, therefore, that the order of Bateson J. directing that the paragraphs in respondent's answer containing the allegations of misconduct and the affidavit of the petitioner in reply should be struck out must be set aside and that leave would be given to the respondent to file a rejoinder.

Wood v. *Wood* [1891] P. 272 and *Kettlewell* v. *Kettlewell* [1898] P. 138, 143 applied.

Decision of Bateson J. reversed.

APPEAL from a decision of Bateson J.

On June 7, 1911, the petitioner May Gertrude Restall went through a ceremony of marriage with the respondent William Long Restall.

On January 17, 1929, the petitioner presented a petition for a declaration that the marriage was null and void on the ground of the consanguinity of the parties.

On May 31, 1929, a decree nisi was made, and on December 9, 1929, the decree was made absolute.

On December 27, 1929, the petitioner presented a petition for permanent maintenance under s. 190 of the Judicature (Consolidation) Act, 1925.

On January 31, 1930, the respondent filed his answer to the petition in which after setting forth the nature of his means and those of his wife, he made the following allegations :

Para. 25.—"On the 10th day of August, 1902, the petitioner gave birth to a bastard child named Reginald Douglas."

Para. 26. " On the 9th day of January, 1905, the petitioner gave birth to a bastard child named Cecil Frank."

Para. 27. " Until about three years after the ceremony of marriage the petitioner concealed from me the fact that she had given birth to the said bastard child Cecil Frank."

Para. 28. " The petitioner has treated me with unkindness and cruelty. She has neglected me and my home. She habitually refused to have ordinary sexual connection with me. She has habitually ill-treated and assaulted my children. She has assaulted and insulted my mother. She has habitually acted towards my relatives, my friends and my employees in such a manner as to make it impossible for them to come to my house. She has habitually associated with persons to whom I objected." He submitted that in the circumstances detailed in his affidavit no order should be made upon the petition and in the alternative that if the Court thought fit to allot maintenance the order should contain " dum sola " and " dum casta " clauses.

On March 5, 1930, the petitioner filed two affidavits, one (sworn February 26, 1930) dealing with the charges made against her by the respondent in his answer, and the other (sworn March 5, 1930) with reference to the means of the respondent and herself.

On March 21, 1930, the respondent applied to the registrar for leave to file a rejoinder. The registrar made an order that paras. 25–28 inclusive of the respondent's answer containing the allegations of misconduct should be struck out and refused the respondent's application to file a rejoinder.

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v.
RESTALL.

On March 31, 1930, Bateson J. confirmed the registrar's order and directed that the whole of the petitioner's affidavit in reply (sworn February 26, 1930) should be struck out.

The respondent appealed. The appeal was heard on April 29, 1930.

Serjeant Sullivan K.C. and *G. C. Tyndale* for the respondent. The question for the consideration of the Court is whether upon an application for permanent maintenance under s. 190 of the Judicature (Consolidation) Act, 1925, the Court will consider matters beyond those affecting the financial position of the parties. It is submitted that the Court in exercising its discretion under the section will consider all the circumstances of the case, including the conduct of the parties, both before and after the marriage: *Rawlins* v. *Rawlins* (1); *Wood* v. *Wood* (2); *Kettlewell* v. *Kettlewell* (3); *Dunbar* v. *Dunbar* (4); *Gardiner* v. *Gardiner* (5); *Chapple* v. *Chapple*. (6) The conduct of the husband and wife is clearly a matter which may be alleged in the pleadings.

W. O. Willis K.C. and *T. Bucknill* for the petitioner. The order of Bateson J. affirming that of the registrar was right. The matters alleged in the paragraphs in question ought not to have been introduced into the answer. Conduct has nothing to do with the amount to be awarded to the wife by way of maintenance. The husband pays according to his means and not according to his conduct.

[LORD HANWORTH M.R. On the question whether a dum casta clause should be imposed evidence of conduct seems material.]

To allow the introduction of this evidence would be to enlarge the jurisdiction of the Divorce Court.

[ROMER L.J. At what period can the question of conduct be introduced?]

When the parties first go before the registrar. The registrar has to hold an inquiry and the matter may then be dealt with on affidavit. The proper practice is first to deal with the property of the parties and then, by leave, to enter into the question of their conduct. It is submitted therefore that the paragraphs in question should in the first instance be struck out.

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(1) (1865) 34 L. J. (P.) 147.
(2) [1891] P. 272, 276.
(3) [1898] P. 138, 142.
(4) [1909] P. 90.
(5) (1920) 36 Times L. R. 294, 295.
(6) (1929) 98 L. J. (P.) 95.

[They referred to Matrimonial Causes Rules, 1924, rr. 57, 61, 64, 65, 67, 69.]

LORD HANWORTH M.R. This appeal raises an important point under s. 190 of the Judicature (Consolidation) Act, 1925. The relevant facts are these. The marriage took place on June 7, 1911, and proceedings were commenced in January, 1929, by the wife to obtain a decree of nullity of marriage on the ground of the consanguinity of the parties. On May 31, 1929, a decree nisi was made which was made absolute in the following December. On December 27, 1929, the wife, as she was entitled to do, filed a petition for permanent maintenance under s. 190 of the Act of 1925. On January 31, 1930, the husband filed his answer to the petition and on March 5 the wife filed an affidavit with regard to the payment of the maintenance and at the same time also filed an affidavit, which had been sworn on March 5, dealing with certain allegations of misconduct which had been made by the husband in his answer. On March 21, the husband applied for leave to file a rejoinder, and the registrar made an order that paras. 25 to 28 of the answer filed by the husband should be struck out and refused the leave asked, and it is with reference to these paragraphs that the appeal arises. They referred to matters which had taken place both before and after the marriage. Paras. 25 and 26 alleged that in 1902 and 1905 before the marriage the wife had given birth to illegitimate children. Para. 27 stated that the husband was not aware of the birth of the second child until three years after the marriage. Para. 28 contained references to the conduct of the wife, such as her having treated her husband badly, and as to her having associated with persons of whom he disapproved. At the end of his answer the husband asked that any order the

Court should make for maintenance should contain "dum sola" and "dum casta" clauses. The affidavit filed by the wife in reply dealt with the paragraphs and the allegations therein contained, but the registrar got rid of all that by taking a short cut and striking out the four paragraphs and refusing to give leave to the husband to file a rejoinder. An appeal was taken to Bateson J. to test the question whether the registrar was right in striking out the paragraphs in question, who on March 31 made an order in the following terms: "Upon hearing counsel for the respondent and petitioner upon the respondent's appeal from the registrar's order dated March 21, 1930, I do order that the said appeal be dismissed and that the whole of the petitioner's affidavit in reply sworn February 26, 1930, be struck out." He therefore confirmed the registrar's order, and the result was that both the registrar and judge held that irrelevant matter had been introduced into the proceedings. An appeal is now taken to this Court to determine the broad question whether the matters alleged in the paragraphs in question, dealing, as the first two of them do, with the conduct of the wife before marriage, are matters germane to this issue of maintenance and matters which ought to be looked at by the Court in considering this petition of the wife under s. 190 of the Act of 1925.

I differ with Bateson J. upon a matter affecting the practice of his own Division with hesitation and with considerable reluctance, but as the matter was dealt with by him in Chambers he had not the opportunity of considering the authorities which have been brought to our attention or the advantage of the careful argument which was addressed to this Court. Also this Court does not intend to go beyond what is absolutely necessary in deciding the question on the facts before us, or to limit the general discretion of the judge.

Sect. 190, sub-s. 1, of the Act of 1925 (so far as is material) is as follows: "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable. . . . ." Now here the present marriage was declared null and void on account of the consanguinity of the parties, and the wife had a right to take advantage of s. 190, under which the Court has a discretion to secure to her a certain sum for her maintenance. The Court has to determine whether "it thinks fit" and in so doing has to consider (*a*) the wife's fortune or circumstances; (*b*) the duration of the term of payment; (*c*) the ability of the husband to pay; and (*d*) the conduct of the parties. Now it is plain, in considering the period over which the payment should extend, that although in the section there is a limit that the term of the annual payments is not to exceed the life of the wife, there may be another term imposed, and that may be by inserting a clause dum sola et casta vixerit. Those are matters which under the section the Court has to consider and in doing so must have regard to (*d*) the conduct of the parties. The obvious question then arises—do the words "conduct of the parties" in the section mean conduct before or after the marriage or both? Mr. Serjeant Sullivan on behalf of the husband has contended that they refer to conduct generally, either before or after the marriage, and I think that is the right view. In *Wood* v. *Wood* (1) Lindley L.J. considered the question whether a dum casta clause should be imposed, and he thought that to do so in the case of a wife of spotless character would be an insult to her. I think that Lindley L.J. in making the observations he did in that case was considering the conduct of the wife throughout, both before and after the marriage, and her general character as shown by that conduct. In *Kettlewell* v. *Kettlewell* (2), which was decided seven years after the decision in *Wood* v. *Wood* (1), Sir Francis Jeune P. came to the conclusion that it would be right to impose a dum casta clause in making an order for maintenance having regard to the wife's conduct before marriage. She

(1) [1891] P. 272.

(2) [1898] P. 138.

had not been chaste, and had previously been divorced. He was therefore compelled to find that her reputation was not spotless, and that there was a danger that she might lapse again, and accordingly he thought that it was only right to impose the clause. That is a definite decision, carrying out the terms of the Act, but, in making an allowance for maintenance, taking into consideration the conduct of the wife before marriage. Those two cases are illustrations of how the duties imposed on the Court by s. 190 should be carried out, and I think it is plain that the words "conduct of the parties" must apply to conduct before as well as after the marriage, for upon all the facts of the case relating to the wife's conduct the Court may have to decide whether or not it is necessary to impose a dum casta clause.

It is said that so to hold will be to cast a further burden on the Court. I doubt this, because I think the registrar will be able to keep the matters in issue within reasonable limits. It is not in every case that the question of the imposition of a dum casta clause arises. I should deprecate this decision being taken as justifying a large number of petty or irrelevant acts between the parties being included in those which the Court must consider; but when there is a petition for maintenance, and the term of the continuance of the maintenance has to be fixed, and also perhaps the question of the imposition of a dum casta clause arises, I think it is most important that the Court should have before it the relevant evidence to enable it to investigate thoroughly the conduct of the parties. It is quite true that in the majority of cases the question before the Court is simply one of the financial position of the parties; but there are certain cases in which it is necessary for the Court to go outside that, and to make a full investigation into their general conduct.

The order of the registrar and the judge to strike out the paragraphs in question will therefore be set aside, and the respondent will have leave to file a rejoinder dealing with the counter-charges made by the petitioner in her affidavit in reply. I need hardly say that we do not in any way desire to fetter the discretion of the judge. All we decide is that the paragraphs are admissible in evidence in these proceedings under s. 190. The measure of importance to be attached to them is another matter.

The appeal will therefore be allowed and the order of Bateson J. discharged.

LAWRENCE L.J. I agree. In exercising its discretion under s. 190, the Court is to have regard to the conduct of the parties, and indeed in *Wood* v. *Wood* (1) Lindley L.J. places the conduct of the parties first in order in his enumeration of the circumstances which have to be taken into account. In *Kettlewell* v. *Kettlewell* (2) Sir Francis Jeune P. in reference to the contention that the Court ought not to have regard to the conduct of the parties before the marriage, said (3): "I cannot agree with the learned counsel for the petitioner in his contention that the words 'the conduct of the parties' in the judgment in *Wood* v. *Wood* (1) are intended to refer only to the conduct of the parties during the marriage. I do not consider myself bound to close my eyes to the fact that the petitioner has been divorced, whoever the man was with whom she committed adultery." In view of this decision, which has never been questioned and in my opinion is clearly right, the order made by the learned judge cannot be justified, as the matters deposed to by the husband in his rejoinder are plainly relevant on the question which the Court has to determine. The weight to be attached to the facts deposed to is another matter, and is not before us.

ROMER L.J. I agree and have nothing to add.

Appeal allowed.

Solicitors for respondent: *Bulcraig & Davis.*
Solicitor for petitioner: *F. G. Bowles.*

(1) [1891] P. 272.
(2) [1898] P. 138.
(3) [1898] P. 138, 143.

W. I. C.

THE CROXTETH HALL.

THE CELTIC.

C. A.
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March 31;
April 1, 2;
May 2.

Shipping—Wages—Wreck of Ship—Unemployed Seaman—Merchant Shipping (International Labour Conventions) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1, *sub-ss.* 1 *and* 2.

The Merchant Shipping (International Labour Conventions) Act, 1925, as appears from the preamble and first schedule thereto, was designed to give effect to certain international Conventions concerning "unemployment indemnity for seamen in case of loss or foundering of their ship."

By s. 1, sub-s. 1, of the Act: "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall . . . . be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date," unless (sub-s. 2) "the owner shows that the unemployment was not due to the wreck or loss of the ship," or that in respect of any day "the seaman was able to obtain suitable employment on that day."

The ships on which the respective plaintiffs were serving were wrecked on their homeward voyages. In each case the service under the articles under which the plaintiffs were engaged would have terminated within a few days after the ships were wrecked. If the ships had not been wrecked both plaintiffs would probably have been re-engaged for the succeeding voyage, but neither plaintiff in fact obtained employment during the two months from the date of the termination of his service, and neither of the defendant shipping companies established that on any day either plaintiff was able to obtain suitable employment:—

Held (per Scrutton and Greer L.JJ.; Slesser L.J. dissenting), that the words of the section were clear and unambiguous, and, accordingly, that the Court was not entitled to look at the preamble or the draft Convention set out in the schedule in order to give a special meaning to the words; that the unemployment in each case was in fact due to the wreck; and that under the section the respective plaintiffs were entitled, not merely to an indemnity against unemployment for the period between the date of the actual termination of the services and the date on which the services would have terminated had there been no wreck, but to wages for two months from the date of the wreck.

Decision of Lord Merrivale P. ante p. 20 affirmed.

APPEALS, heard together, from a judgment of the President (Lord Merrivale) in two actions brought by seamen against shipowners. Both cases raised a question under the Merchant Shipping (International Labour Conventions) Act, 1925, as to a seaman's right to wages after his services have been terminated by the wreck or loss of the vessel on which he was employed.

The plaintiff in the first action was John Murray, quartermaster and able-bodied seaman on the steamship *Croxteth Hall*, owned by Ellerman Lines, Ld., which was wrecked off Flushing on February 27, 1929. The plaintiff claimed loss of wages for two months—total 31*l.* 4*s.*

In the second action the plaintiff was Joseph Comerford, refrigerating greaser and seaman on the White Star liner *Celtic*, which was wrecked when entering Queenstown on December 10, 1928. He claimed in respect of the like period 33*l.* 8*s.*

Both cases had been referred to the Admiralty Division by a Court of summary jurisdiction at Liverpool under s. 165 of the Merchant Shipping Act, 1894. (1)

Sect. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925, provides: "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date." (2) Sub-s. 2 provides that "a seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."

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(1) Sect. 165 provides that: "A proceeding for the recovery of wages not exceeding 50*l.* shall not be instituted by or on behalf of any seaman . . . . as an Admiralty proceeding in any Court having Admiralty jurisdiction in [Her Majesty's] dominions, except (iii.) where a Court of summary jurisdiction acting under the authority of this Act, refers the claim to any such Court."

(2) Sect. 158 provides that: "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship . . . . he shall be entitled to wages up to the time of such termination, but not for any longer period."

The President held that the section did not merely give an indemnity against unemployment for the period between the date of the actual termination of the services and the date on which the services would have terminated had there been no wreck, but entitled the seaman to compensation for loss of employment for a maximum period of two months from the date of the wreck. The shipowners appealed.

Dunlop K.C. and *A. J. Hodgson* for the appellants in both actions. The statute gives a seaman whose ship has been wrecked a prima facie right to receive wages up to the natural termination of his services under the articles, but not exceeding a period of two months, i.e., he is given an indemnity against the loss of wages he would have earned under the articles if there had been no wreck. The words used are "wages," not "compensation," and, as the language of s. 1 is capable of more than one interpretation, the Court is entitled to have regard to the preamble and schedule (see *The Cairnbahn* (1)), which annexes the Convention and shows that what was intended was an indemnity when the services terminate before the date contemplated in the agreement. In each of the cases under consideration the services under the existing articles would have terminated within a few days.

[SCRUTTON L.J. May it not be a possible view that their unemployment was due to the state of the labour market? See *Bevan* v. *Nixon's Navigation Co.* (2)]

That is a possible view. Murray, the plaintiff in the *Croxteth Hall* case, was an old man, and it was in evidence that there were thousands of seamen in Liverpool and Birkenhead looking for work; the other plaintiff, Comerford, never applied at the White Star office in Liverpool at all. But even if the plaintiffs or either of them would in all probability have been re-engaged if their respective vessels had not been wrecked, the unemployment was not "due to the wreck" within the meaning of the section after the contemplated dates when their services would have terminated under their respective agreements.

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(1) [1914] P. 25, 29.

(2) [1929] A. C. 44.

Langton K.C. and *Lynskey K.C.* for the respondent Murray. The seaman has to establish two facts: (*a*) that his services under his agreement with the shipowners were terminated by a wreck, and (*b*) that he was in fact unemployed. The shipowners must then prove that the unemployment was not due to the wreck, or that the seaman was not unemployed on a certain day or days. The shipowners have not discharged the onus upon them in respect of either of these issues. There was no precise date contemplated in the agreements, but merely a probable date in each case. Under the articles Murray's services could continue for any period not exceeding two years, and Comerford had to serve until the *Celtic* returned to a final port of discharge. Liverpool may have been contemplated as the final port of discharge, but a mere probability is not sufficient.

[SCRUTTON L.J. referred to *The Scarsdale* (1) and *Haylett* v. *Thompson*. (2)]

In any event the wreck was before the date contemplated in the agreement, and even if there were only one month to run under that agreement, in the absence of proof by the shipowners that the unemployment was not due to the wreck, the plaintiff would still be entitled to two months' wages under the statute, the language of which is quite clear and unambiguous.

Fraser Harrison for the respondent Comerford adopted the same arguments.

Hodgson in reply. The agreement in Murray's case was a voyage agreement, and, therefore, the date contemplated was that which the shipowners contemplated, a date as to which there was no dispute.

[SLESSER L.J. referred to the observations in the House of Lords on the meaning of "contemplated" in *Conway* v. *Wade*. (3)]

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(1) [1907] A. C. 373, 378.
(2) [1911] 1 K. B. 311.
(3) [1909] A. C. 506.

Sub-s. 1 of the Act cannot be divorced from sub-s. 2, and, taken together, the effect of the proviso under sub-s. 1 is that an indemnity, and no more than an indemnity, is given, i.e., the seaman is put in the same position as he would have been had there been no wreck.

[Reference was also made to *The Olympic* (1) and Maxwell's Interpretation of Statutes, 7th ed., p. 19.]

Cur. adv. vult.

1930. May 2. The following judgments were read:—

SCRUTTON L.J.: Until 1925 the wages of a seaman ceased on the wreck of his ship, but he was returned to the United Kingdom at the expense of the shipowner. On July 31, 1925, there came into force an Act of Parliament (15 & 16 Geo. 5, c. 42) designed to give effect to certain international Conventions arrived at in 1920 and 1921. Such conventions have no effect in Great Britain until they are embodied in statutes, though if the language of the statute is ambiguous, resort may be had to the language of the Convention to assist in interpreting the statute. The title of this statute employs the phrase: "An unemployment indemnity for seamen in the case of loss or foundering of their ship." The material section (s. 1, sub-ss. 1 and 2) reads as follows: (1.) "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date." (2.) "A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the

(1) [1913] P. 92, 109, 112.

owner shows that the seaman was able to obtain suitable employment on that day."

It is obvious that the wreck or loss of a ship on which a seaman is serving will always happen before the date contemplated for the termination of his service. The subsection therefore gives him for two months after the wreck a right to receive wages at the rate mentioned in the agreement. If I understood correctly the argument of Mr. Dunlop for the shipowners, he contended that under this sub-section alone the seaman could not get wages for any period after the date at which, had there been no wreck, the agreement to serve would have terminated. I cannot obtain this result out of the language of sub-s. 1, which appears to give wages for a fixed term of two months from the wreck, "subject to the provisions of the section." The relevant provision is sub-s. 2, which I have just read. This puts the burden on the shipowner to prove certain facts which would displace the right to wages acquired by the seaman under sub-s. 1. He may show that the unemployment was not due to the wreck or loss of the ship. The seaman is obviously unemployed on the ship in which he served because of its loss. But his actual unemployment on any ship at all may be primarily or proximately due to his own disability, as if he breaks his leg after he has safely landed, or after the same date gets sent to prison. Unemployment may also be directly due to the fact that he has made no attempt at all to obtain other employment, though vacancies on other ships were being offered, but has simply gone on the "dole." In such a case, if proved by the shipowner, I think the unemployment would not be due to the wreck. The seaman may prove that, at the time of the wreck, he had either a promise of employment on the next voyage or a reasonable expectation from past history of obtaining such employment. For instance, where for some years the seaman has been regularly re-engaged after the voyage, and his agreement terminates, I think the seaman would be entitled to say that he was unemployed as the result of the wreck. But the employer might still displace it by showing that the seaman has made no attempt at all to obtain substituted employment, though it was offering.

I think a difficult question may arise if the employer proves that the state of the labour market is such that, if there had been no wreck, the seaman on his engagement terminating would not have obtained employment either in the wrecked or any other ship. This is similar to the question on which there has been much discussion under the Workmen's Compensation Act, 1925. The question there arises in this way. By s. 1 a workman suffering personal injury by accident is entitled to compensation from his employer, and, under s. 9, sub-s. 1, where partial incapacity for work results from the injury, a weekly payment calculated on certain rules, one item in which is the weekly amount he is able to earn after the accident. This is accompanied by a provision that if the workman proves he has made reasonable steps to obtain employment and has failed, and that his failure is a consequence wholly or mainly of the injury, the judge may order his incapacity to be treated as total incapacity. On these provisions the question has arisen: "What is the position where though the workman lost his employment through accident, on his recovery, a partial recovery, the condition of the labour market is such that even if the workman had never met with an accident he would have been out of work, and could not get employment?" In such a state of facts the House of Lords has held that unemployment is not a consequence wholly or mainly of the accident or injury, but is a consequence of the state of the labour market, and that "able to earn" relates to physical capacity to earn, and not to the state of the labour market: *Bevan* v. *Nixon's Navigation Co.* (1); *Lyon* v. *Taylor Brothers.* (2)

I have come to the conclusion that these decisions turn on the special language of the Acts applicable, and that no principle involved in those decisions enables the employer under the Act now under consideration to prove that the unemployment is not "due to the wreck" by proving the

(1) [1929] A. C. 44.

(2) (1928) 21 B. W. C. C. 415.

state of the labour market, and so to defeat the claim. In other words, where either by express agreement, or on reasonable probability from past history, the seaman would but for the wreck have continued to be employed in the wrecked vessel, his loss of employment is due to the wreck, even though in the state of the labour market he finds difficulty in getting employment. Apart from evidence of refusal to serve on any particular day, the cause or the effective cause of his unemployment is the wreck.

The second part of sub-s. 2 enables the employer to defeat the prima facie claim under sub-s. 1 by proving in respect of any day that the seaman was able to obtain suitable employment on that day. This is a different and independent provision. The employer may not be able to prove it, and yet may succeed under the first part of sub-s. 2, as if the employer proves that the day after the seaman was safely back in England he broke his leg and was laid up for two months, or, to take an extreme case, if the employer proves that on the same day the seaman was sent to prison for two months. But I do not think the employer satisfies the second condition in sub-s. 2 by proving vacant places for which any seaman might apply and no attempt to obtain them. That, in my opinion, will be relevant under the first condition. To satisfy the second condition the employer must prove an offer to the seaman of suitable employment, and a refusal by the seaman. I can see that difficult questions may arise when the wages offered are less than the wages earned before the wreck, and it is questionable whether the difference is due to changed conditions of the labour market or to different value between the labour originally done and the labour offered.

It will be seen that in my view each case must depend on its own particular facts, but I have endeavoured to lay down certain principles for the construction of the statute by which the particular facts in each case may be tested.

I now turn to the two cases in question, with the warning that the decision in each case does not necessarily apply to each man involved in the wreck in question.

C. A.
1930

THE CROXTETH HALL.
THE CELTIC.

Scrutton L.J.

The *Croxteth Hall* was wrecked off Flushing on February 27, 1929. John Murray was then engaged in her on an agreement dated October 29, 1928, for a voyage not exceeding two years from Manchester to the Persian Gulf, trading within certain limits, and to end at such port in the United Kingdom or continent as may be required by the master. After reaching Antwerp with a homeward cargo the ship was proceeding to the United Kingdom, and was advertised to load cargo for a new outward voyage—at Hull, March 2; Middlesbrough, March 11; London, March 15; South Wales, March 22; and Glasgow, March 27. Murray had been previously engaged in the *Croxteth Hall* on four voyages, with one break, and usually stood by on pay while the ship was in port after he was paid off till he signed on again. Before the wreck he had been asked by the chief officer to stand by the ship when she got to Middlesbrough, which was apparently then treated as the end of the voyage, and was expected to be reached on March 10 or 11. After the wreck Murray was taken to Liverpool, and there paid off on March 4. He claimed two months' wages from March 4. This was clearly wrong, as the two months began on February 27, and he had been paid up to March 4. It is further clear that but for the wreck he would have been paid up to March 10 or 11, on arrival at Middlesbrough. In my opinion, also, the evidence shows that but for the wreck he would have been employed on the *Croxteth Hall*, standing by at Middlesbrough, coasting, and on the next voyage. So that the shipowner, to displace his liability, must show that on some named day Murray could have obtained suitable employment.

I am not very satisfied with Murray's behaviour. He did not apply to the owners of the *Croxteth Hall* for employment; he energetically repudiated the suggestion that he should apply to their shipping clerk. "It was as much for the firm to give an offer to me as for me to give an offer to the firm." He did apply to one of the Hall boats for a job, the *City of Athens*, and another man got the job. He attended the signing on of a number of other ships, but being an elderly man, and a stranger to the chief officer of the particular ship, he did not get a job. I am satisfied that unless the shipowner orders the chief officer of a particular ship to take on a particular man or men from the wrecked ship, that man —particularly if he is elderly—is not very likely to get a job. A ship's officer, unless ordered by his employers, naturally prefers men he knows, and men of as much youth as is consistent with experience. The evidence, in my opinion, does not show that Murray, on any particular day, was able to get employment on any particular ship, or that he made no attempt to obtain employment, or that his unemployment was not the result of the wreck. Under these circumstances he is entitled to receive from the shipowner two months' wages from February 27, less any amount the shipowner has already paid him as wages. But he is not entitled to receive both the dole and wages, and his counsel admitted this, and that the Court should make some provision to prevent it. I think the proper way to deal with the point is to order that the shipowner may satisfy the judgment against him by paying to the Ministry of Labour the amount which Murray has received in respect of the dole from the Labour Exchange, in respect of the two months in question, and by paying the balance of the judgment, if any, to Murray. It will be seen that the judgment does not apply to any other seaman of the *Croxteth Hall*, except in so far as the facts of his particular case come within the principle of this judgment. While the judgment is varied to the extent I have indicated, and I do not agree with some part of the reasoning of the President, the appeal must be dismissed with costs.

THE CELTIC.

The *Celtic*, a White Star liner trading to and from Liverpool, was wrecked off Queenstown on December 10, 1928. Comerford, a refrigerating greaser, was brought back to Liverpool, and there paid off on, and up to, December 11, 1928. Comerford, with the exception of twelve months, had been employed on the *Celtic* for nine years, and the

White Star officials say they could not have a better man. I am satisfied that it was a result of the wreck that he was not employed on the *Celtic* during the two months in question. Comerford tried to get on a number of ships, including some of the White Star vessels, but did not get a job. He did not apply to the White Star office, or its shipping master, for a job; I suspect this was the result of the instructions of the Union officials. But whether this be so or not, the White Star officials did not offer him an engagement on any particular ship, and in the result are, in my opinion, unable to prove that he was able to obtain suitable employment on any particular day. I think in the case of engineers, the second engineer who takes on men, in the absence of definite instructions from his employers—which were not proved—is not likely to give any special preference to men from other wrecked ships of the line. Comerford is, therefore, entitled to receive two months' wages from the date of the wreck, less any wages he has received, and the appeal must be dismissed with costs.

There is no information about the dole in this case, but I trust the local Labour Exchange will look into the matter, both in this case and any future case.

I appreciate the difficulties of the shipowners in these cases. Perhaps they will consider whether by registered letter they should make an offer of employment in a named ship to each man they wish to employ, and instruct their chief officer or engineer to make that offer effective. I am also not satisfied with the system under which the seaman, whether under instructions of Union officials or not, intentionally makes no application to his previous employers for employment, and then claims on them for unemployment. If such an intentional course of conduct is proved, it may have a serious bearing on the question whether the shipowners have not proved that the seaman's unemployment is not the result of the wreck.

GREER L.J. John Murray, the plaintiff in the first named case, signed articles in October, 1928, by which he undertook to serve on board the S.S. *Croxteth Hall* for a voyage to the Persian Gulf, and thence to other ports between 75° N. and 60° S. latitude, and to and at such port in the United Kingdom or continent of Europe within home trade limits as might be required by the master. He was selected by the master to act as quartermaster during the voyage at 9*l.* 10*s.* per month. The vessel was wrecked off Flushing on February 27, 1929. The President of the Probate, Divorce and Admiralty Court who heard the action, found that if there had been no wreck the voyage would have ended at Middlesbrough on March 11, 1928. The plaintiff claimed under the Merchant Shipping (International Labour Conventions) Act of 1925 two months' wages from March 4, 1929, when he was paid off. He was clearly not entitled to wages for more than two months from February 28, the date of the wreck, and it is not disputed that the judgment will have to be varied so far as the amount is concerned.

It was contended for the appellant shipowners that the plaintiff was only entitled to wages down to the date when his service under the articles would have terminated at the end of the voyage—i.e., March 11, 1929. The learned President decided against this contention. In my judgment he was right in so deciding. I can state my reasons quite shortly. The evidence established a probability, almost amounting to a certainty, that if the voyage had ended normally on March 11, the plaintiff would have been forthwith employed by the shipowners in the same capacity on the same ship. [His Lordship read s. 1, sub-ss. 1, 2 and 3 of the Act, and continued as follows :] The plaintiff was in fact unemployed for two months from the date of the wreck, though he was paid his wages to March 4. Sub-s. 1 entitled him to wages up to April 28, unless the defendants proved facts which would disentitle him to receive his wages or some part thereof under sub-s. 2. In my judgment the defendants did not show that the unemployment from which he in fact suffered was not due to the wreck. If they had proved that in the event of the vessel completing her voyage there was no reasonable probability that he would have been

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employed on the *Croxteth Hall*, it might have been contended that his unemployment in fact was not, after March 11, due to the wreck, as it would have happened if there had been no wreck. It seems to me clear that the section is not dealing with unemployment under any existing contract, but with unemployment in fact, that is to say actual unemployment. In my judgment the words of sub-ss. 1 and 2 are plain and unambiguous, and we are therefore not entitled to look at the preamble or the draft Convention contained in the schedule to the Act for the purpose of giving a special meaning to words which are in themselves plain and unambiguous. It is conceivable that it might have been the intention of the legislature to provide the seaman with an indemnity against the loss of wages which he would otherwise have earned under the contract of service which was in operation at the date of the wreck, but it is impossible, in my judgment, to interpret the words of the two sub-sections as having a meaning which would confine the seaman's right to wages to a right which would not exceed wages for the period during which his existing contract would have continued. I think the words plainly mean that if his services end before the date contemplated in the agreement, and he is in fact unemployed for the period of two months from the date of the wreck, he is entitled to receive wages for every day during those two months during which he is unemployed, unless his employer proves that he would have been unemployed if there had been no wreck. The question whether his actual unemployment was caused by the wreck is a question of fact to be determined on the evidence. The evidence in the present case makes it reasonably certain that if the *Croxteth Hall* had not been wrecked the plaintiff would not have been unemployed. The fact that he might have got employment if the state of the labour market had been better than, in fact, it was, has, in my judgment, no bearing on the question whether the unemployment from which he in fact suffered, under the circumstances of the case, was due to the wreck. Even if the Court were entitled to look at the schedule, I doubt whether it would make any difference in the result. Art. 2 of the Convention is not necessarily concerned with an indemnity against unemployment under the contract in operation at the date of the wreck; it is concerned with indemnity against unemployment resulting from the loss of the ship. It may well be that those responsible for the Convention intended to indemnify the seaman against actual unemployment whenever it was established that the unemployment was, in fact, due to the wreck. I see no reason to conclude from the words of the Convention that the parties to it intended to confine the indemnity to an indemnity against a loss of wages under the contract in operation at the date of the wreck; but be this as it may, I think the words of the statute are plain and ought to be interpreted in the manner above stated.

In the present case I am satisfied that if the vessel had not been wrecked, the plaintiff would not have been unemployed from and after March 11, and, therefore, that the shipowners failed to show that his unemployment was not due to the wreck. Nor am I able to say that the learned President's finding that the defendants had failed to prove that the seaman was able to obtain suitable employment on any day during the two months is not justified by the evidence. I agree with the view expressed in my Lord's judgment as to both points, and find it unnecessary to refer to the evidence in detail.

A reference was made in the course of the argument to cases under the Workmen's Compensation Act, such as *Cardiff Corporation* v. *Hall* (1) and *Bevan* v. *Nixon's Navigation Co.* (2) I do not think that these cases afford any help in the interpretation of the statute we have to apply in the present case. They turn on the meaning of the words "able to earn" in the Workmen's Compensation Act. It was decided that looking at the general purpose and scope of the Workmen's Compensation Act, "able to earn" means "physically able to earn." The decisions in those cases seem to me to have no bearing on the interpretation of s. 1

(1) [1911] 1 K. B. 1009.
(2) [1929] A. C. 44.

of the Merchant Shipping (International Labour Conventions) Act, 1925.

In the second case the facts raise the same question as to the effect of s. 1 on the claim made by the plaintiff Comerford, and the defences raised by the owners of the *Celtic*, and in this case I do not find it necessary to say anything except that, for the reasons stated in dealing with the first case, I am of opinion that the plaintiff is entitled to retain the judgment he obtained in the Court below, and the appeal should be dismissed with costs.

The order of the Court in Murray's case will, by consent of the plaintiff by his counsel, take the form mentioned in Scrutton L.J.'s judgment.

SLESSER L.J. In these cases I regret that I have to come to a conclusion different from that of the majority of the Court.

These appeals raise important questions under the Merchant Shipping (International Labour Conventions) Act, 1925, which purports to give effect to certain draft Conventions adopted by the International Labour Conference relating (among other things) to an unemployment indemnity for seamen in the case of loss or foundering of their ship. In my opinion these are cases where, owing to the ambiguity of the language used in the Act, and its intention as expressed in the preamble and schedules, a reference to the preamble and title is justified as a means of ascertaining the general object and intention of the Legislature for the purpose of solving the ambiguity. This is in accordance with the well known passage of Tindal C.J. in the *Sussex Peerage* case (1): "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the

(1) (1844) 11 Cl. & F. 85, 143.

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preamble, which, according to Dyer C.J. is 'A key to open the minds of the makers of the Act, and the mischiefs which they intended to redress'": see Lord Macnaghten in *Fenton* v. *Thorley & Co., Ld.* (1)

In this case the Legislature has thought fit in the peculiar circumstances of the case, the statute being the ratification of an International Convention, to annex the Convention to the preamble by a schedule to the Act itself. This is the preamble: "Whereas at Genoa the General Conference of the International Labour Organisation of the League of Nations on the ninth day of July, nineteen hundred and twenty, adopted a draft convention concerning unemployment indemnity for seamen in case of loss or foundering of their ship, and at Geneva on the eleventh day of November, nineteen hundred and twenty-one, adopted two other draft conventions, namely, a draft convention fixing the minimum age for the admission of young persons to employment as trimmers and stokers, and a draft convention concerning the compulsory medical examination of children and young persons at sea:

"And whereas the said draft conventions contain (together with other provisions) the provisions set out in Parts I., II. and III. respectively of the First Schedule to this Act:

"And whereas it is expedient that for the purpose of giving effect to the said draft conventions, such provision should be made as is contained in this Act:

"Be it therefore enacted. . . . ."

The First Schedule, Part I., of the Act to which I have referred contains the draft Convention concerning unemployment indemnity in case of loss or foundering of the ship which is material in para. 2 of the preamble.

The assistance which the preamble provides in interpreting s. 1 of the Act, the meaning of which is here in dispute, is to be found in art. 2 of the First Schedule, which is in the following terms:—

"In every case of loss or foundering of any vessel, the owner or person with whom the seaman has contracted for service on board the vessel shall pay to each seaman employed thereon an indemnity against unemployment resulting from such loss or foundering.

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(1) [1903] A. C. 443, 447.

"This indemnity shall be paid for the days during which the seaman remains in fact unemployed at the same rate as the wages payable under the contract, but the total indemnity payable under this Convention to any one seaman may be limited to two months' wages."

The word "indemnity" which is used in this article does not appear in s. 1, but in so far as the appellant is here contending that s. 1 is limited to an indemnity, and as the section is ambiguous and is capable of such a construction, the preamble and the schedule do enact that an indemnity, and no more than an indemnity for unemployment in the case of loss or foundering of the ship, is what the section intends to confer upon the seaman.

An indemnity is an undertaking, express or implied, to indemnify against the liability. And it is material to consider what is the matter which the statute calls upon the shipowner to indemnify. By s. 158 of the Merchant Shipping Act, 1894, where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or the loss of the ship, he shall be entitled to wages up to the time of such termination, but not for any longer period. This is the provision which is amended by s. 1 of the Act now under consideration, and, were it not for that Act, as the Merchant Shipping Act provides, the right to wages would cease when the services of the seaman terminated before the date contemplated in the agreement in case of wreck or loss.

In the case of the *Croxteth Hall* the plaintiff had signed articles to serve for a voyage of not more than two years' duration commencing at Manchester and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master. The ship was wrecked on February 27, 1929, and the learned President has found that had there been no wreck the voyage would have teminated on March 11, 1929. In any event, under s. 1, the plaintiff would not be entitled to wages for more than two months from February 27, but it is argued for the appellants that having regard to the fact that his services under the articles would have terminated on March 11, 1929, and having regard to the fact that he was actually paid until March 4, he is only entitled to wages from March 4 until March 11. On the evidence it appears very probable that if the voyage had ended on March 11, the plaintiff would have been further employed by the defendants, but, in the view which I have taken, such a consideration is not open under the statute.

It is true that s. 1, sub-s. 1, speaks of the seaman being in fact "unemployed during a period of two months from the date of the termination of the service" where his service terminates by reason of the wreck or loss of the ship before the date contemplated in the agreement. But sub-s. 2 of the same section is in the following terms: "A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day," and this provision enables the owner to prove—the onus being upon him—that the unemployment was not due to the wreck or loss of the ship. Having regard to the fact that s. 158 of the Merchant Shipping Act, which this Act in terms seeks to amend, provides that where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck he should be entitled to wages up to the time of such termination, and having regard to the view that I have formed that the present section operates by way of indemnity, I think that once the employer has shown as a fact that the agreement of service would have terminated in any event on a particular date, he has discharged the onus upon him of showing that unemployment beyond that date was not due to the wreck or loss of the ship. If, on the facts of this case, it had not been found that the agreement would have ended at Middlesbrough on March 11, 1929, it might have been otherwise. But I find

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it impossible to think that the mischief to which the Act was addressed and the benefits which the Legislature intended to confer upon the seaman, by the language used, were more than this: that where the shipowner failed to prove that the unemployment was not due to the wreck or loss of the ship, the seaman might recover wages for two months. In my judgment, it does no more than to put the seaman in the like position as to wages, subject to a two months' limitation, qua his employer as he would have been if the wreck or loss of the ship had not occurred.

I am fortified in the view which I have formed by a consideration of the decisions under the Workmen's Compensation Act, which seemed to me to be in pari materia. Para. 3 of the first schedule to the Workmen's Compensation Act, 1906 (now repealed), provided that in fixing the amount of weekly compensation, the weekly payment should in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is able to earn from suitable employment.

In *Ball* v. *William Hunt & Sons, Ld.* (1), Lord Shaw commenting on the words "able to earn" in Schedule I. (iii.) of the 1906 Act said: "It does not appear to me to be any part of the scheme of the statute to make the employer responsible for a non-employment which is owing to general economic causes. The non-employment . . . . must be connected with the injury which has been received and with the incapacity for work which has been thereby produced. Even treating that incapacity as inclusive of the case of the impossibility or improbability of obtaining work, as well as of doing it, that impossibility or improbability must be traceable to the thing which has differentiated this workman from his other able-bodied comrades—namely the injury received." See also *Bevan* v. *Nixon's Navigation Co.* (2); *Cardiff Corporation* v. *Hall* (3) to the same effect.

In my view, the employer has here imposed upon him no more than an indemnity for loss of employment under the

(1) [1912] A. C. 496, 508.

(2) [1929] A. C. 44.

(3) [1911] 1 K. B. 1009.

agreement which the seaman has sustained by reason of the wreck or loss of the ship. When the obligation of the employer would have come to an end in any event if the ship had not been wrecked—which termination is for the employer to prove—any further unemployment due to the labour market or other cause cannot be said to be an unemployment due to the wreck any more than inability to earn under s. 9 of the Workmen's Compensation Act, which is the result of the labour market, can be said to be due to the accident. In construing this section as no more than indemnity I apply the maxim "Causa proxima non remota spectatur."

The second case, *The Celtic*, falls to be decided upon the same principle. In that case the wreck was on December 10, 1928. The learned President has found that but for the wreck the plaintiff's service under the articles would be terminated on December 11, and he would have been paid off with wages up to and including that date; that the vessel was homeward bound at the time of being lost, making for Liverpool, which would have been, as is found, the port of discharge under the articles. In this case therefore the employers, by showing that the agreement would have ended in any event on December 11, have discharged the burden of showing that any subsequent unemployment was not due to the wreck and, therefore, have discharged themselves from the liability imposed by s. 1 of the 1925 Act.

For these reasons I think that these appeals should be allowed.

Appeals dismissed.

Solicitors for the appellants: *Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondents: *Pattinson & Brewer, for G. J. Lynskey & Son, Liverpool; D. H. Mace, Liverpool.*

E. C. M. T.

NACHIMSON *v.* NACHIMSON

Explained. KENWARD *v.* KENWARD [1951] P. 124

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May 15.

Husband and Wife—Marriage—Distinction of Contract and Status—Lex loci contractus—Foreign Law—Dissolution by Consent or at Will of one Party—Registration—No Proof of Causes—No Act of State terminating Status—Parties to Contract, whether Husband and Wife according to English Law—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 21, *Part VIII.*, *s.* 185.

Marriage is a voluntary union for life of one man and one woman to the exclusion of all others, and where a marriage in a foreign country complies with these requirements it is immaterial that under the local law dissolution can be obtained by mutual consent or at the will of either party with merely formal conditions of official registration.

Warrender v. *Warrender* (1835) 2 Cl. & F. 488 applied.

A man and a woman, both domiciled Russians, entered in Russia into a contract accepted by the local law as one of marriage. The marriage could, according to the same law, be dissolved by mutual consent or at the will of one of the parties, with merely formal conditions of official registration:—

Held, on an issue directed in a suit by the woman for judicial separation, that as the union so formed was of one man to one woman to the exclusion of all others, it constituted a valid marriage according to English law, notwithstanding that it could, according to the local law, be dissolved as stated above.

Decision of Hill J. ante p. 85 reversed.

APPEAL from a decision of Hill J. (1)

Serafima Ilyinitchna Nachimson, petitioner in a matrimonial suit, was married to the respondent, Gregory Michailovitch Nachimson, on March 19, 1924, at Moscow Provincial Registration Office, Krasno Presna Section, Moscow, according to the acceptance of "marriage" in the local law, their domicil being Russian. At the material times the parties cohabited in England and had a female child born on November 2, 1925. On January 29, 1929, the marriage was, as the respondent alleged, dissolved at the Consulate General in Paris of the Union of Soviet Socialist Republics at the instance of the respondent by his ex parte registration of the fact. The petitioner filed the present petition in the Divorce Court, dated March 9, 1929, praying a judicial separation on the ground of the cruelty of the respondent.

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(1) Ante, p. 85.

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The respondent appeared under protest and on April 15, 1929, the Court at first directed the trial of an issue whether the marriage had been dissolved by decree of the Consular Court. The order for the trial of this issue was subsequently discharged and on November 11, 1929, the following questions were ordered to be tried before the hearing of the petition—namely :—

Have the petitioner and respondent ever been husband and wife ? If yea :

(*a*) Were the parties domiciled in Russia on January 29, 1929 ? and

(*b*) Was their marriage dissolved on that day ?

Various interlocutory proceedings took place in the suit in which by his answer to the petition the respondent denied the charges against him, denied that either he or the respondent was ever domiciled in England, and countercharged the petitioner with having committed adultery.

At the hearing of the issue the evidence of several experts in Russian law was admitted. The experts were not unanimous on the question whether the registration of the dissolution of the marriage in Paris was effective to dissolve it, but they agreed as to the nature of the union between the parties and the way in which in general it could be dissolved. They agreed that it could be terminated either by mutual consent or the unilateral desire of one party. The effect of their evidence as to the manner of dissolution is stated in the judgments of the Court of Appeal.

Both parties in the Court below contended that there had been such a relation of husband and wife as to give the Court jurisdiction.

Hill J. held that "marriage" in English law meant a voluntary union of one man and one woman to the exclusion of all others, which was by them indissoluble except by death. That being so, the union of the petitioner and respondent was not a "marriage" and the petitioner and respondent never were "wife" or "husband" within the meaning of English law. The parties must therefore resort to the Courts of Russia for the ascertainment of their legal rights.

The petitioner appealed. The appeal was heard on April 11, 1930.

Serjeant Sullivan K.C. and *Eric Dance* for the appellant. Having regard to the evidence as to the Russian law it is submitted that the marriage in the present case was a marriage for the life of the parties. It was entered into with all the formalities required by that law and was therefore a good contract of marriage. The matters relating to the dissolution of that contract are merely collateral. The defeasibility of the contract is not a test of its validity: *Warrender* v. *Warrender*. (1)

The question in the present case is whether the contract of marriage is affected by the conditions of its defeasance, that is, whether the conditions of defeasance are of the essence of the contract, and it is submitted that they are not.

There is no reported case in which it has been decided that the facilities of divorce affect the validity of the contract.

Divorce is not an incident of the marriage contract to be governed by the lex loci contractus, but is an incident of status to be disposed of by the law of the domicil of the parties: *Harvey* v. *Farnie*. (2)

Hyde v. *Hyde* (3) was a case of polygamy and on a different footing. There the Court declined to interfere in the case of a Mormon marriage on the ground that it could not recognize it as a marriage at all. The basis of the judgment was that the English law was inapplicable to the status of women in cases of polygamous unions.

In *Brinkley* v. *Attorney-General* (4) the marriage between a British subject and a Japanese woman was held valid in this country, because it was a union with one woman during the subsistence of the marriage. The interruption of the President in the course of the argument (5) shows that he was aware that Japanese marriages did not always last for life. In that case no question as to the conditions of the defeasance of the marriage was considered.

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(1) 2 Cl. & F. 488.

(2) (1880) 6 P. D. 35.

(3) (1866) L. R. 1 P. & M. 130.

(4) (1890) 15 P. D. 76.

(5) 15 P. D. 79.

A marriage such as the monogamous marriage in the present case may be set aside by a Russian Court or by any other Court, but while it lasts it is a regularly constituted marriage and the English Courts will regard it as such.

In *In re Bethell* (1) the marriage between an Englishman and a Baralong woman was held not a valid marriage according to English law. The judge there treated the case as one of intention of the parties at the time of the marriage and held as a matter of inference of fact that the man did not intend to take the woman as his wife in the Christian sense, but in the polygamous or Baralong sense. It might have been a marriage in the Christian sense if it had been so intended.

[They also referred to *Rex* v. *Hammersmith Superintendent Registrar of Marriages* (2) and *Lolley's* case. (3)]

F. L. C. Hodson and *Krougliakoff* for the respondent. The argument put forward on behalf of the appellant depends on marriage being nothing more than a contract. It is submitted, however, that it is more than a mere contract: *Warrender* v. *Warrender* (4); *Hyde* v. *Hyde.* (5) All the cases cited by Hill J. proceed upon the basis that marriage is more than a mere contract, and that it cannot be rescinded by mutual or unilateral desire. A marriage which, as in the present case, can be rescinded at the will of either party is of such a flimsy nature that it cannot be regarded as a marriage union for life and therefore it is not a marriage.

The question what is meant by "marriage" is discussed in *Niboyet* v. *Niboyet.* (6) What matters is what will be attributed to it by the law. In the present case the attributes of the marriage were fixed by the law of 1918 and it is immaterial what the intention of parties to it was. Calling a contract a marriage does not make it one. No marriage under the Soviet law of 1918 will be recognized as a marriage by any Christian Court. Incestuous and polygamous marriages are not so recognized.

(1) (1888) 38 Ch. D. 220.
(2) [1917] 1 K. B. 634.
(3) (1812) 2 Cl. & F. 567*n*.
(4) 2 Cl. & F. 488, 531.
(5) (1866) L. R. 1 P. & M. 130.
(6) (1878) 4 P. D. 1, 11.

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In *Brook* v. *Brook* (1) it was held that the forms of entering into the contract of marriage were regulated by the lex loci contractus, and that if the essentials of the contract were contrary to the law of the domicil, the marriage (although duly solemnised elsewhere) was there void.

The decision in *Niboyet* v. *Niboyet* (2) that the Court had jurisdiction to grant a divorce against a foreigner was in effect overruled by *Le Mesurier* v. *Le Mesurier* (3) and definitely overruled by *Salvesen or von Lorang* v. *Administrator of Austrian Property.* (4) We attach great weight to the words "for life" in Lord Penzance's definition of marriage in *Hyde* v. *Hyde* (5) as the voluntary union for life of one man and one woman to the exclusion of all others.

[LORD HANWORTH M.R. referred to *Warrender* v. *Warrender* (6) as to the dissolubility or indissolubility of the contract.]

Mitford v. *Mitford* (7) is complementary to *Salvesen's* case. (4) As was said in *Mitford* v. *Mitford* (7) there may be different ceremonies and different degrees of solemnity, but the contract entered into must be one which conforms to the ordinary definition of "marriage."

Here the only attributes to the marriage are those given to it by Russian law and those do not bring the marriage up to the standard of an English marriage.

[They also referred to *Lord Roos's* case (8); Dicey's Conflict of Laws, 3rd ed., p. 841; 4th ed., p. 891.]

Serjeant Sullivan K.C. replied.

Cur. adv. vult.

May 15. The following written judgments were delivered:—

LORD HANWORTH M.R. The question to be decided in this issue is whether the parties have contracted a marriage that is to be recognized as such by the Courts of this country.

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(1) (1861) 9 H. L. C. 193.
(2) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) [1927] A. C. 641.
(5) L. R. 1 P. & M. 130, 133, 135.
(6) 2 Cl. & F. 488, 532.
(7) [1923] P. 130.
(8) (1669) Macq. H. L. Practice (1842), pp. 551, 556, 559.

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On March 19, 1924, the parties who are both domiciled Russians, went through the procedure requisite for a legal marriage under Russian law at the Moscow Provincial Registration Office, Krasno Presna Section, Moscow, and, having thus carried out the formalities duly, were by Russian law deemed to be married. It is not suggested that they could have done more than they did to acquire the status of man and wife or to carry into effect a contract of marriage, and no question arises as to capacity or as to mutual consent freely given. Subsequently they cohabited for some few years, a child being born on November 2, 1925.

As the law in Russia stood at the date of the above proceedings, under a statute passed in 1918, a marriage lasted during the lifetime of the spouses, but could be terminated either by the mutual consent of both spouses or by the unilateral desire of either of them. The dissolution by mutual consent had to be registered at the proper office of registration without more; but, in the absence of mutual consent, an application had to be made to a Court of law by the party desiring the dissolution, the Court being that of the residence of the other party. It was necessary to summon that other party, or to show that it was impossible to do so. Subject to this procedure, the dissolution was obtained as of course. As one of the witnesses called expressed it: "The judge merely registered the divorce—that was his duty; it was not necessary to have any proof of any cause, a mere desire was sufficient."

By a law passed in 1927 dissolution of the marriage was made even simpler; mere registration of the dissolution at the proper office was alone required. It is, however, unnecessary to consider the situation under this later law, for the question is whether the proceedings in 1924 created a valid marriage. Nor have we to determine or even to discuss the question whether, if it is a valid marriage, it has been duly dissolved. That question will require argument, and possibly evidence, at a later stage in the suit; for the present, this Court is concerned to determine the question above stated.

In a recent case, *Berthiaume* v. *Dastous* (1), Lord Dunedin says: "If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil of one or other of the spouses." That is a restatement of what had previously been laid down in many cases. In *Warrender* v. *Warrender* (2)—a case which as Lord Dunedin said in *Salvesen or von Lorang* v. *Administrator of Austrian Property* (3) is a decision of great moment in marriage law—Lord Brougham had said (4): "Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise."

In *Harvey* v. *Farnie* (5) Lord Selborne said: "Let it be granted (and I think it is well settled), that the general rule, internationally recognized, as to the constitution of marriage is, that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere if it is well constituted secundum legem loci contractus."

Further, marriage is not only to be regarded as a contract. It confers and constitutes a status—a status which is not only recognized in the country of the domicil of the spouses, but universally: see *Harvey* v. *Farnie* (6); and per Hannen P. *Sottomayer* v. *De Barros* (7), if authority be needed for the proposition.

I do not apprehend that Hill J. doubted or disagreed with the above propositions. But he held that, by reason of the facilities for the dissolution of the marriage by Russian law,

(1) [1930] A. C. 79, 83.
(2) 2 Cl. & F. 488.
(3) [1927] A. C. 641, 660.
(4) 2 Cl. & F. 488, 530.
(5) (1882) 8 App. Cas. 43, 50.
(6) 6 P. D. 35, 48.
(7) (1879) 5 P. D. 94, 101.

the nature of the contract between the parties was such that it could not be held to be a marriage intended and contemplated in what is now the Judicature (Consolidation) Act, 1925, s. 21, and Part VIII. of that Act. His judgment is summarized thus (1): "I hold that 'marriage' in English law means a voluntary union of one man and one woman to the exclusion of all others which is by them indissoluble except by death. If this be the true meaning of marriage in English law, it is the antithesis of a union which the parties or a party can dissolve at will by complying with the forms prescribed by law."

This view leads one to consider whether the means of dissolving a marriage is a test of its validity in our law, so long as the procedure results in a status of marriage according to the law of the domicil, and the marriage is monogamous and does not permit polygamy. The definition of marriage as understood in Christendom is the voluntary union of one man and one woman to the exclusion of all others. If a marriage satisfies this test, is it to be further examined to discover on what grounds, and with what facilities, it can be dissolved in the State where it was effected?

Lord Brougham put the question tersely in *Warrender* v. *Warrender* (2): "But it is said that what is called the essence of the contract must also be judged of according to the lex loci; and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract": and a little further on he demonstrates the fallacy of this proposition in that "it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the country where the parties reside [i.e., are domiciled], and where the contract is to be carried into execution."

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(1) Ante, p. 98.

(2) 2 Cl. & F. 488, 532.

This answer to the question whether indissolubility is of the essence of the contract appears to me complete. The petitioner stated in evidence that when she married she intended the union to be for life. Further it must not be overlooked that, although the union may be readily dissolved, until the dissolution is made effective by registration, it subsists, and excludes the possibility of there being any other party who could share the status of marriage with the two on whom it has been conferred by the law of their domicil.

Some countries allow greater facilities for the dissolution of the marriage tie than others, and if dissolubility was of the essence of the contract and a test of the validity of the marriage tie it would be a matter of degree to be determined in varying cases in various countries whether the marriage was to be estimated as binding. Lord Brougham (1) gives the illustration of an Englishman marrying in Prussia, where he says that the law there obtained—what it may be to-day I know not—that incompatible temper—i.e., disagreement—will provide reason for the dissolution of the marriage contract; but he holds that the marriage is good as being contracted in accordance with the lex loci, though in England it could not be dissolved on such a ground. He finds from this an answer to the argument of the alleged essential quality of indissolubility.

There can be no doubt as to the rigidity of the rule of English law which requires marriage to be of one man with one woman for life to the exclusion of all others. It is by reason of this rule that polygamous marriages are excluded from recognition here. So too a man of English domicil who formed a union with a woman of the Baralong tribe, and desired to be regarded as being for the purpose of their relations a member of the tribe, was held not to have contracted a marriage recognizable as such by English law. Stirling J. held that "the proper inference is that he meant to enter into no higher or other union than that which between members of the tribe was regarded as a marriage": see *In re Bethell.* (1) As by the customs of the tribe polygamy was allowed, such a union could not satisfy the test required by the Law of English marriage: see also *Hyde* v. *Hyde* (2) a Mormon marriage.

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(1) 2 Cl. & F. 488, 534.

So too where two British subjects with a British domicil contracted a marriage in accordance with the lex loci, but contrary to the law of their domicil, their marriage was held void in this country: *Brook* v. *Brook.* (3)

But a marriage will be recognized as valid here, if it is contracted in a non-Christian country in accordance with the law of that country, provided that the parties are during its subsistence precluded by law from marrying any one else: see *Brinkley* v. *Attorney-General* (4), per Hannen J.

The distinction between a valid marriage and the possibilities of its dissolution is well marked in *Rex* v. *Hammersmith Superintendent Registrar of Marriages* (5), where a valid marriage in England between an Indian of the Mahomedan faith and an English woman was upheld, and the power of dissolution at the will of the husband according to his religious law by a writing of divorcement was held not to attach to the marriage.

The requisites of a valid marriage in English law are in my judgment correctly stated in Rayden on Divorce, 2nd ed., pp. 34, 35, paras. 8-12, and it will be noticed that the possible means and grounds for dissolving the contract are not included. If they were considered essential, a serious inroad would have been made on the universally accepted rule stated above, which has a continuous chain of authority to support it.

Another rule must be remembered. Proceedings for the dissolution of the marriage are governed by the law of the domicil of the spouses at the time when they are instituted: see *Bater* v. *Bater* (6); and per Lord Haldane in *Lord Advocate* v. *Jaffrey.* (7)

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(1) 38 Ch. D. 220, 235.
(2) L. R. 1 P. & M. 130.
(3) 9 H. L. C. 193.
(4) 15 P. D. 76, 79.
(5) [1917] 1 K. B. 634.
(6) [1906] P. 209.
(7) [1921] 1 A. C. 146, 152.

These two rules appear to govern the present case. It may be that our minds, trained to regard marriage as in most cases sanctified by religious rites—in others by a civil procedure not less binding—recoil at the recognition of a union capable of being dissolved so easily as the marriage of these spouses when contracted in Russia appears to have been. Nevertheless that marriage has the essential legal ingredients. It is the union of one man and one woman to the exclusion of all others; it is to last for life unless it is dissolved in a manner that is made definite and final by registration. It was duly entered into in accordance with the forms required by the lex loci of the domicil of the parties to it. I find myself unable consistently with the authorities, to criticize or to weigh the strength that ought to be attached to the tie which forms the nexus and union of the spouses or to qualify the essence of the marriage by consideration of the means whereby it may be dissolved if and when that question falls to be determined by the law of the domicil of the parties.

For these reasons the appeal must be allowed, and the issue answered that the parties did become husband and wife by their marriage on March 19, 1924.

LAWRENCE L.J. The question on this appeal is whether a marriage, celebrated in Russia, according to the forms prescribed by Russian law as it stood in 1924, between Russian subjects domiciled and resident in Russia ought to be recognized by English law as a valid marriage.

The principles upon which the answer to this question depends are not in dispute; the difficulty which has arisen lies entirely in the application of those principles to the facts of the present case.

As all the relevant authorities have been fully dealt with by the learned judge and by the Master of the Rolls, and as none of them has been questioned in this Court, I do not propose to review them again.

The definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others," given by Lord Penzance in *Hyde* v. *Hyde* (1) has been accepted and relied upon by counsel on both sides. The three experts in Russian law called as witnesses at the trial were entirely agreed that a marriage celebrated in Russia in conformity with the relevant Russian law strictly complies with this definition. Notwithstanding this consensus of opinion among the experts, however, the learned judge has held that in view of the law of divorce prevailing in Russia at the time when the marriage in question in the present case was celebrated, it ought not to be recognized by English law, because (although complying with the definition of marriage in all other respects) it was not in essence a union for life. With the greatest respect for the opinion of the learned judge I am unable to agree with that decision.

Both in Russia and in England something more than mere agreement between the parties is required in order to constitute a valid marriage: in both countries a marriage is regarded as an institution and confers a status; and in both countries the status so conferred carries with it certain rights and obligations.

According to the relevant Russian law, it is essential for the constitution of a valid marriage that the parties should attend before an official appointed by the State, whose duty it is to register marriages, and unless the marriage is duly registered it is not recognized in Russia as valid. The formalities attending the celebration of a Russian marriage are thus not unlike those attending the celebration of a civil marriage in England.

In Russia, as in England, the parties cannot obtain the registration of a marriage which is limited in its duration. The only marriage contract which the relevant Russian law and the English law recognizes is a contract constituting a union for life.

The laws of both countries, however, recognize divorce, and it is the difference between the laws of the two countries in the matter of divorce which has given rise to the difficulty

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(1) L. R. 1 P. & M. 130, 133.

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in the present case. Although in both countries the law provides for the dissolution of a marriage, the grounds upon and the procedure by which the dissolution may be effected differ substantially in the two countries.

There is no need to dwell upon the English law of divorce. The grounds upon which a decree will be granted and the procedure for obtaining a decree are well known. It is sufficient for the purposes of this judgment to mention that, according to English law, a marriage can only be dissolved by a decree of a competent Court, and that such a decree cannot be obtained by consent, but is only pronounced by the Court on proof of certain matrimonial offences.

Under the relevant Russian law, however, if both the spouses desired to obtain a divorce they could do so by appearing together before the official in charge of the register in which the marriage had been recorded, and on their declaring their desire to be divorced the registrar was bound to register the divorce, and, when so registered, the marriage was dissolved. Thus the formalities required by the relevant Russian law for effecting a valid dissolution of a marriage, in cases where both spouses were agreed, were, mutatis mutandis, the same as those required for constituting the marriage, registration being the essential formality in both cases. This kind of divorce was called by the experts "a divorce by registration."

If one of the spouses desired to obtain a divorce against the wishes or without the consent of the other, then the spouse desirous of obtaining the divorce had to institute legal proceedings in the Court having jurisdiction in the place of residence of the other spouse, who had to be duly summoned. In such proceedings it was sufficient in order to obtain a decree that the spouse instituting the proceedings should declare his or her desire to be divorced and, provided that the prescribed formalities were complied with, it was the duty of the Court to pronounce a decree, the judge having no discretion to withhold it. There was no appeal against such a decree, but it might be quashed by a superior Court on the ground of want of jurisdiction (e.g., where there had been no valid marriage) or on the ground of some irregularity in the procedure.

The net result of the relevant Russian law was that either or both of the spouses, on taking the prescribed steps, could obtain a dissolution of the marriage, although it was a union for life and although no matrimonial offence had been committed.

The learned judge has held that the grounds upon which, and the procedure by which, a marriage could be dissolved under the relevant Russian law were of such a character as in effect to render the marriage terminable at the pleasure of either party, and that, therefore, it ought not to be recognized by the Courts of our country as a true marriage such as is the subject of rules of private international law. This conclusion is based on the fact that, although the relevant Russian law required some act of State in order to effect a valid dissolution, the only act of State so required was a purely ministerial act, and that consequently the marriage contract constituted in essence merely a union at will and not a union for life.

In my opinion the learned judge, in arriving at this conclusion, has erroneously treated the provisions for the disruption of the marriage tie enacted by the Russian law as conditions incorporated in and forming part of the marriage contract, instead of treating them, as in truth they are, as conditions of defeasance enacted by the law of the domicil of the spouses, which conditions in no way depended upon any agreement between them, and which, moreover, they were powerless to alter or escape from.

Mr. Dovrin, the leading expert in Russian law, stated that, according to the relevant Russian law, any agreement made between the parties when entering into a marriage about its duration would be absolutely void, because in Russia a marriage was always a marriage for life, but that the Russian law gave the parties the right, on complying with certain formalities, to put an end to it, which right, however, was not conferred by the contract between the parties, but was the result of the public law.

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Lord Brougham, in *Warrender* v. *Warrender* (1), after stating that marriage is one and the same thing substantially all the Christian world over, dealt with the argument that the Scotch Courts had no power to dissolve a marriage celebrated in England where according to the law then prevailing a marriage was indissoluble except by Act of Parliament as follows: "The fallacy of the argument, 'that indissolubility is of the essence,' appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the country where the parties reside, and where the contract is to be carried into execution." Lord Brougham then gives several illustrations showing the absurd consequences which would result from the doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts of the country in which the parties happen to be residing, pointing out that, according to that doctrine, if the marriage had been solemnized in Prussia either party might obtain a divorce here on the ground of incompatibility of temper; if it had been solemnized in France during the earlier period of the Revolution the mere consent of the parties ought to suffice for dissolving it here; and that if there were a country in which marriage could be dissolved without any judicial proceedings at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there and uphold a second marriage contracted after such a separation.

It is worth noting that Lord Brougham, whilst pointing out the absurd result of holding that the lex loci as to divorce was incorporated in the contract of marriage, thus enabling the spouses to import that law into all countries where they might thereafter take up their residence, does not suggest that a marriage celebrated in a country the laws of which permitted its dissolution on the grounds and in the manner indicated by him would be invalid.

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(1) 2 Cl. & F. 488, 532, 533.

The distinction clearly stated by Lord Brougham to exist between the terms of the contract of marriage on the one hand, and the rights and obligations of the parties flowing from or arising under such a contract on the other hand is all-important in determining the present case. The validity and construction of the contract no doubt depend upon the lex loci contractus, but the status of the spouses and their rights and obligations arising under the contract are governed by the law of the country in which for the time being they may happen to be domiciled.

In my judgment, the validity of a marriage celebrated in a foreign country conforming in all respects to the definition of a Christian marriage, as understood by our law, does not depend upon whether under the law of the country where it was celebrated it could be dissolved more or less readily. Neither the grounds upon which nor the procedure by which a dissolution can be effected under the lex loci contractus for the time being in force are, in my opinion, relevant factors in determining whether a marriage is one which our Courts will recognize as valid. There are countries where incompatibility of temper is a sufficient ground for divorce, and no substantial distinction can be drawn between such a ground and the mutual agreement of the parties to separate, yet counsel did not suggest that a marriage celebrated in such a country would not be recognized as valid here. It was, however, strenuously contended that no marriage in a country, the laws of which permitted the parties to obtain a divorce without a decree of a competent Court, pronounced in judicial proceedings, ought to be recognized in our Courts as a valid marriage. I know of no authority which compels this Court to come to such a conclusion, nor, indeed, have I found any case where the Court has investigated either the grounds on which or the procedure by which a marriage may be dissolved in the country where it was celebrated in order to determine its validity here. In my opinion, it is contrary to the generally recognized rules of private international law that our Courts should refuse to recognize a marriage had in a foreign country conforming in all respects to the laws of that country and to our conception of a Christian marriage merely because under the laws for the time being in force in that country the facilities for divorce happened to be far greater than in England and such as would probably not commend themselves to most English people. The adoption of such a rule would lead to the embarrassments referred to by Lord Brougham in his judgment in *Warrender* v. *Warrender* (1), where he asks the question: "What can be more embarrassing than that a person's status should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there?"

The present case might, possibly, have assumed a different complexion if it could have been proved, either that the particular marriage in question had in fact been a mere sham and a mere cloak for casual intercourse or else that the relevant Russian law was such that all marriages celebrated whilst it was in force were only marriages in name conferring no status and entailing no obligations. The evidence, in this case, however, completely negatives the existence of either of those conditions. The wife deposed to the fact that her bona fide intention in marrying her husband was to constitute a union for life; the husband's counsel did not dispute this—on the contrary, in the Court below, he insisted that the marriage was a valid marriage; and the experts in Russian law deposed to the fact that a marriage celebrated in accordance with the relevant Russian law was recognized in Russia as an institution conferring a status and entailing definite obligations.

The decision in *Brinkley* v. *Attorney-General* (2) shows that a marriage celebrated in a non-Christian country, if

(1) 2 Cl. & F. 488, 549. (2) 15 P. D. 76.

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conforming to our notion of a Christian marriage, will be recognized by our law as valid. In that case, a British subject whilst temporarily residing in Japan, married a Japanese woman in Japan according to the forms required by the Japanese law. Sir James Hannen held that the marriage was valid in this country on the ground that it conformed to our notion of a Christian marriage inasmuch as according to the laws of Japan the husband was precluded from intermarrying with any other woman during the subsistence of the marriage. No evidence was adduced in that case as to the Japanese law of divorce, and, so far as known to the Court, there might have been a law which permitted the dissolution of marriages by mutual consent without any judicial proceedings. It is true that, in answer to a question put by the learned President during the argument, counsel for the Attorney-General conceded that the marriage in question would be a valid marriage if it were established that it excluded the possibility of the husband marrying another wife while that marriage subsisted, but I cannot help thinking that, in spite of the concession so made, the very experienced and learned President would not have upheld the validity of the marriage in the absence of evidence as to the Japanese law of divorce if he had considered that the validity of the marriage depended upon whether, under that law, it could or could not have been dissolved without a decree pronounced in judicial proceedings.

In the present case the learned judge placed much reliance on the following passage in the judgment of Stirling J. in *In re Bethell* (1): "I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence 'the voluntary union for life of one man and one woman to the exclusion of all others.'" This passage must, however, be read in reference to the question which the learned judge had to decide—namely, the validity of a so-called marriage between an Englishman and a native woman celebrated according to the rites of the Baralong tribe, among the members of which polygamy prevailed, the evidence showing that the so-called husband meant to enter into no higher or other union than that which between members of the tribe was regarded as a marriage. The decision in that case has no application to the facts of the present case; and the point to which the passage in question was directed was that a Baralong marriage did not conform to our conception of a Christian marriage inasmuch as it did not preclude the man from marrying another woman during its subsistence. The mind of the learned judge was not directed to the effect of the local law of divorce on a marriage which conformed in all respects to our conception of a Christian marriage.

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(1) 38 Ch. D. 220, 234.

The decision of the learned judge in the present case, if right, would entail the strange consequence that no valid marriage would have been possible in Russia whilst the relevant Russian law was in force even between two British subjects temporarily resident in, but unable to leave, that country however much they might have desired to get married and to enter into a union for life.

The learned judge seems to have based his judgment on the following two propositions, neither of which, in my opinion, is well founded; first, that the only marriage recognized as such by English law is one by which "the parties are bound to one another until death unless the State dissolves the bond," and, secondly, that the contract of marriage included the conditions of defeasance prescribed by the Russian law.

As to the first of these propositions, as a rule persons do not enter into a contract of marriage with an eye to its defeasance, but only with an eye to its continuance, but if it be right to qualify the definition of a valid marriage by the introduction of a reference to its dissolution (which, in my opinion, it is not) the qualification instead of being "unless the State dissolves the bond" should be "unless the bond is dissolved during the lifetime of the spouses in accordance with the law of their domicil for the time being." As to the second proposition, I have already fully stated my reasons for coming to the conclusion that the conditions of defeasance prescribed by the relevant Russian law formed no part of the contract of marriage.

In the result, for the reasons stated, I agree that this appeal should be allowed.

ROMER L.J. On March 19, 1924, the petitioner and the respondent in these proceedings were married to one another in Moscow in the only way permitted by the law of Soviet Russia. It has been held however by Hill J. that the marriage is not one that can be recognized by the Courts of this country. Whether he was right in so holding is the question, and the only question, to be decided upon this appeal.

The attitude of the law of England towards marriages celebrated in foreign countries has on many occasions been the subject of consideration by our Courts. In *Warrender* v. *Warrender* (1) the House of Lords was called upon to consider whether it was competent to the Scotch Courts to entertain a suit to dissolve a marriage entered into in England between a man domiciled in Scotland and a woman domiciled here. The question therefore was one as to the attitude of the law of Scotland to a marriage celebrated in another country. But in the course of his speech Lord Brougham expressed himself in terms that are equally applicable to the law of England. He said (2): "A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract." He then

(1) 2 Cl. & F. 488. (2) 2 Cl. & F. 530.

explained what he meant by the word "marriage" in this statement. "If indeed," he said, "there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same every where. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer."

A marriage celebrated in a foreign country in accordance with the laws of that country will therefore be regarded in our Courts as a valid marriage if it be what Lord Brougham called a "Christian marriage." He did not indicate what he meant by a Christian marriage, further than appears from the passage which I have just read.

In *Hyde* v. *Hyde* (1), however, Lord Penzance defined a Christian marriage in terms that have ever since been

(1) L. R. 1 P. & M. 130.

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accepted by the Courts of this country. The subject-matter of investigation in that case was a marriage celebrated in Salt Lake City in accordance with the rites and ceremonies of the Mormons, of whose doctrine polygamy formed part. In holding that the marriage was not one that could be recognized by the Matrimonial Court of England, Lord Penzance said (1): "Marriage has been well said to be something more than a contract, either religious or civil—to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognized one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

The only words in this definition that create any difficulty are the words "for life." Lord Penzance's judgment was given in the year 1866, at a time, therefore, when the Matrimonial Causes Act of 1857 had been in operation for several years, and at a time when in most Christian countries a marriage could be dissolved for various causes. It seems clear therefore that in deciding whether any particular union of one man and one woman is for life, the fact that the union is made dissoluble in certain events by the laws of the country where it is entered upon must be disregarded. And this is in precise accordance with the statement made by Lord Brougham in *Warrender* v. *Warrender* (2) that dissolubility or indissolubility is not of the essence of the contract of

(1) L. R. 1 P. & M. 133.

(2) 2 Cl. & F. 488.

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marriage. He said (1): "The fallacy of the argument, 'that indissolubility is of the essence,' appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the country where the parties reside, and where the contract is to be carried into execution." He then pointed out what ridiculous conclusions would result from importing into the contract of marriage the provisions of the lex loci as to dissolubility. If this were done, then, in the case of a marriage of a domiciled Englishman in a foreign country, the Courts here might have to grant a divorce for a reason that is treated as adequate by the law of that foreign country, but is not an adequate one according to our law. I will not read the passage in which Lord Brougham dealt with this aspect of the matter. (2) It is, however, interesting to observe that in this passage Lord Brougham seems to be treating as Christian marriages those made in Prussia, where either party might obtain a divorce on the ground of incompatibility of temper; those made in France during the earlier part of the Revolution, when apparently they could be dissolved merely by consent, and those made in a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate. It would seem that Lord Brougham treated all those marriages as Christian marriages. He would not otherwise have referred to them as marriages, or have regarded even the possibility of the Courts here being asked to deal with them in any way.

So far as I am aware, the circumstances in which a marriage is made dissoluble by the law of the country where it is contracted have never, prior to the present case, been

(1) 2 Cl. & F. 533. (2) 2 Cl. & F. 534.

regarded as throwing light upon the question of its validity in this country. In *Brinkley* v. *Attorney-General* (1), the validity of a marriage celebrated in Japan between a man of Irish domicil and a Japanese woman came into question. The evidence showed that, according to Japanese law, the man was precluded from marrying any other woman during the subsistence of the marriage. Sir James Hannen pronounced for the validity of the marriage, without apparently thinking it relevant to inquire in what circumstances a marriage can be dissolved in Japan. He seemed to treat the words "during the subsistence of the marriage" as a sufficient compliance with the words "for life" in the definition of a Christian marriage given by Lord Penzance.

Let me now turn to the facts of the present case. The Soviet law does not recognize religious forms of marriage. The petitioner and respondent, therefore, contracted a civil marriage before the proper registration officer, and an entry of it was made in the appropriate register. The marriage produced various consequences. So long as it continued neither party could lawfully marry another. Even when it was dissolved, some of the duties imposed upon the parties by virtue of the marriage continued for a time. Mr. Dovrin stated that each party was obliged to support the other party and the children for a year after the dissolution. There can be no doubt that, apart from the question of dissolubility, the marriage falls within the definition given by Lord Penzance. The three experts in Russian law called before Hill J. were unanimous as to this. Mr. Dovrin was asked: "In 1924 was not a marriage in Russia the union of one man with one woman presumably for life," and he answered, "Yes, and it is now." He explained this answer later by pointing out that it was impossible for the parties when entering into the contract of marriage to make any stipulations as to its duration. He said, "It will be absolutely void, because marriage by itself always was a marriage for life, but the law gave the right to the parties to put an end to it. It is not a result of their contract when entering into the marriage or at any time. It is the law."

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(1) 15 P. D. 76.

Mr. Konkevitch said that he had heard Mr. Dovrin's evidence and confirmed it entirely. Dr. Idelson was asked, "Do you agree that in 1924 a marriage in Russia was a union for life of one man with one woman to the exclusion of others," and he said that he did. Hill J. however has held that, notwithstanding all this, the marriage cannot be recognized in the Courts of this country by reason of the Soviet law relating to its dissolubility. That law in the year 1924 was as follows. If both parties agreed to a dissolution, they could effect it by registration at the office where the register of their marriage was kept, it being necessary that both parties should appear before the registrar and make a declaration of their desire that the marriage should be dissolved. If the dissolution was sought by one only of the parties against the wish of the other, judicial proceedings were necessary. The Court, however, does not seem to have had any discretion in the matter. The fact that one party desired a dissolution being established, it was the duty of the Court to make a decree dissolving the marriage. In 1927 the necessity of making an application to the Court in such a case was abolished. If the Court by its decree had merely to give effect to the desire of the applicant, it was no doubt felt that the desire might just as well be expressed before a registrar and given effect to by a registration. As from that time, therefore, a marriage can be dissolved at the instance of one only of the parties and against the will of the other by mere registration. It is obvious, therefore, that a marriage in Russia is a thing of a much more precarious nature than is a marriage contracted in England. But is it for that reason to be treated as a marriage that cannot be recognized as valid by the English Courts? Upon this question Hill J. summed up his views in these words (1): "I hold that 'marriage' in English law means a voluntary union of one man and one woman to the exclusion of all others, which is by them indissoluble except by death. If this be the true meaning of marriage in English law, it is the antithesis of a union which the parties or a party can dissolve at will by complying with the forms prescribed by law. In Christian marriage, using the term in the wide sense, and in marriage recognized as such by English law, the parties are bound to one another until death, unless the State dissolves the bond. In a marriage under the Russian law the parties are bound to one another until death or until one (or both) desires a dissolution and procures the ministerial act of State which gives legal force to the desire. In the one case the promise is: 'I take you for my spouse until death parts us.' In the other it is: 'I take you for my spouse until death or the choice of either parts us.' It may be that the law of Russia, recognizing such a union, attaches legal consequences to it and calls it by a Russian word which is properly translated, marriage. But by the term 'marriage' the law of Russia and the law of England do not mean the same thing." It will be observed that Hill J. here (1.) includes in the contract of marriage the conditions of defeasance, and that (2.) so including them he draws a distinction between a dissolution of the bond by the State and a dissolution of the bond by one or both parties desiring a dissolution and obtaining the ministerial act of State that gives legal force to the desire. With great respect to the learned judge I venture to disagree with him on both these points.

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(1) Ante p. 98.

As I understand Lord Brougham's observations in *Warrender* v. *Warrender* (1), the contract of marriage does not include the conditions of defeasance. If it be regarded as doing so, the difficulties pointed out by him will at once arise, and a marriage effected by a man of English domicil in a country whose laws provide for dissolution on the ground of incompatibility of temper might on that ground have to be dissolved by the Courts of this country. But the dissolubility or indissolubility of a marriage in truth depends upon the domicil of the parties to it at the time it is sought to dissolve it. If, therefore, the validity of a marriage in a

(1) 2 Cl. & F. 488.

foreign country is to depend upon the circumstances in which it can be dissolved, it must depend upon the domicil of the parties to it and the state of the laws of the country of that domicil in relation to divorce. If the dissolubility of the marriage be imported into the contract, a marriage between two domiciled English people temporarily resident in Russia should be regarded as a contract under which the parties are bound to one another until the English Court dissolves the bond, and two persons of Russian domicil married in this country should be regarded as contracting to be bound to one another until one or both desires to be released and makes the necessary declaration and obtains the necessary registration of dissolution in Russia. Nor, so far as I can see, would the validity of a marriage depend merely upon the law as to divorce prevailing in the locus contractus at the time of the marriage. For if the parties to a marriage are to be deemed to be entering into a contract with a condition for its defeasance in the events provided for in the divorce law of the country where it is celebrated, I can see no reason why this law should not be the law of the country from time to time. If that be so, then a marriage celebrated in Imperial Russia would have to be regarded as invalid after the coming into operation of the Soviet system of law. In this connection it may be observed that Hill J. has incorporated into the contract of marriage between the petitioner and the respondent a condition of defeasance at the instance of one of the parties by mere registration, though this method of dissolving the marriage without going to the Court was not permissible at the time when the marriage was effected. None of these difficulties arise except upon the somewhat cynical hypothesis that parties intend to contract marriage, not for life but only until its dissolution in accordance with the laws of the country where it is celebrated. Lord Brougham regarded the intention of the parties as going to the root of the matter, and, for myself, I prefer to consider each of two persons contracting marriage in this country as intending to be bound to one another for life rather than as intending to be bound until the other one commits adultery. Whatever may be the law of Soviet Russia as to divorce, I cannot see why two decent-minded people, who happen to be resident there and get married in the only way that law permits, should not be regarded as intending to be entering into a union for life. The petitioner in the present case has sworn that at the time of her marriage she did so intend, and there is nothing to show that the respondent had any different intention. It is said, however, that if the Court is to treat their marriage as a valid one, then it must treat as valid a marriage entered into one day, and dissolved the next by mutual consent or at the instance of the one party. It is meant by this, I suppose, to suggest that what is little more than an act of promiscuous intercourse may have to be treated as a valid marriage. If one can conceive the possibility of two people going to the trouble of attending before a registrar and registering their marriage for such a purpose, I think that the Courts of this country would know how to deal with the case if the facts were brought to its notice. But if a man should persuade a woman to marry him, her intention being to form a union for life, and his being, unknown to her, to form a union for a day or two, I see no reason why the Courts of this country should assist him in his nefarious scheme by refusing to recognize the validity of the marriage.

But even assuming that there is to be imported into every marriage contract the conditions of its defeasance according to the law of the country where it is entered into, then the contract is one to last for life or until its earlier termination in accordance with the laws of divorce that may be applicable to it. Hill J. has taken the view, and has come to the conclusion that where those laws permit of a dissolution of the marriage by the State the marriage may be regarded as a Christian marriage, but where they permit of a dissolution by the act of the parties the marriage is not to be so regarded, even though, as in Russia, they have to obtain a ministerial act of State which gives legal force to their desire. For myself, I am unable to understand this distinction, assuming, as of course I must assume, that Hill J. regards a dissolution of marriage in this country as being made by the State. For it is only made by the State in the sense that in certain circumstances one of the parties is entitled to come to the Court and express a desire to have the marriage dissolved. The Court has, of course, to be satisfied that the particular circumstances have arisen, but, having been so satisfied, the Court has in general no discretion in the matter. It has to perform the ministerial act of State which gives effect to the desire of the petitioner. The only distinction between our law and the law of Soviet Russia seems to be that the circumstances to be proved by the party applying for a dissolution of the marriage are different, and, no doubt, widely different. But the dissolution in Russia is as much or as little a dissolution by the State as it is in England. It is true that in Russia the ministerial act of State was in the year 1924 performed by a registrar where both parties desired a dissolution, and at the present time even when only one party desires it. But can that make any real difference? In Russia the State official to whom has been given by the State the duty of exercising the ministerial act is a registrar. In this country he is a judge. But the difference between a Christian and a non-Christian marriage cannot turn upon the distinction between a judge and a registrar.

We have not been given any evidence as to the laws of divorce in other Christian countries, but it is easy to conceive of a law that permits of divorce merely for incompatibility of temper. A husband and wife must be the best judges of whether their tempers have proved to be incompatible, and if they both agree that it is so, I could well understand the ministerial duty of recording their agreement and of giving effect to their desire being entrusted to some official other than a judge. If there should in truth be a country possessing such a law I am not prepared to say that a marriage celebrated within its territory is not a Christian marriage. Yet that would seem to be the result of the judgment under appeal.

For these reasons I agree that the appeal should be allowed, and the issue answered in the manner indicated by the Master of the Rolls.

Appeal allowed.

Solicitor for appellant: *A. E. Wyeth.*
Solicitors for respondent: *Charles Russell & Co.*

W. I. C.

1929
May 16.
1930
April 15, 16;
May 19.

APTED *v.* APTED AND BLISS.

Divorce—Practice—Adultery of Petitioner—Discretion of Court to grant Decree—Statement in Petition that Exercise of Discretion is sought—Lodgment in Court of Statement of Facts and Grounds for Exercise of Discretion—Penalties for Suppression of Facts or False Statement—Contempt of Court—Further Consideration of Facts—Reference to King's Proctor—Modern Principles of Exercise of Discretion—Public Interest—Condonation of Adultery of Petitioner—Conduct of Petitioner or Respondent conducing to Guilt of Other Party—Interest of Children—Future of Guilty Party—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85)—*Matrimonial Causes Act,* 1860 (23 *&* 24 *Vict. c.* 144)—*Matrimonial Causes Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 19)—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 177, 178, *sub-s.* 3; 181, *sub-s.* 1.

The discretionary power of the Court to grant a decree of divorce to a petitioner guilty of adultery is a regulated discretion which it is the duty of the Court to reduce to method. The primary essential for the exercise of its power by the Court is that there should be secured to it the means of knowledge of the material facts with reasonable certainty. With this end in view the fact that the exercise of the discretion is sought should appear on the face of the petition. There should be lodged along with the application for the certificate of a registrar that the proceedings are in order, preliminary to setting down, a statement of the matters in respect of which the exercise of the discretion is prayed and the grounds on which the petition in this behalf is based. The intervention of the King's Proctor following suppression of fact or presentment of falsehood by a petitioner in these matters is not the only safeguard for the observance of due procedure. A party to a divorce proceeding who is asking to have the discretion of the Court favourably exercised and who in doing so acts in such a manner as to obstruct or divert the course of justice is guilty of a contempt of Court and liable to its consequences. The multiplication of the tribunals in whom is vested the jurisdiction to decree divorce has rendered necessary a more precise procedure to secure the presentment to them of the facts in each case material to the exercise of the discretion and, if necessary, cases can then be adjourned for further consideration and the services of the King's Proctor made available. To formulate and limit with precision the grounds for the exercise of the discretion when the facts are once before the Court is a practical impossibility; they cannot be rigidly defined but certain broad principles can be gathered from authority. The more strict and early view that two or at most three classes of cases only called for the exercise of the discretion savoured more of estoppel than of the powers of the Court as defined by statute. Those two classes arose either when the respondent had induced the petitioner to believe in the death of the respondent or when a petitioning wife had been forced by a respondent husband to lead an immoral life, and the question was treated as open whether condonation of the petitioner's adultery constituted a third class. To-day these may be stated as guiding principles; a governing consideration is now the interest of the community at large in maintaining the sanctions of honest matrimony; a strong affirmative case is still necessary to justify the Court in departing from the discretionary prohibition of relief to a guilty petitioner; it is manifestly contrary to law that a judicial discretion in favour of a litigant who has been guilty of adultery should be exercised when that course will probably encourage immorality: if the exercise is not unlikely to have that effect there is an argument against leniency. On the one hand condonation by a respondent of a petitioner's adultery is, though not so in the earlier time, admittedly now a ground for exercising the discretion; on the other hand, it is now a ground for refusing to exercise the discretion that the adultery of the petitioner has in some serious degree conduced to that of the respondent and conversely that a respondent should not escape the consequences of his or her proved adultery by putting forward similar acts of the petitioner for which the respondent was in any serious degree responsible. Further matters now considered are the interests of children, the position of a mother in whose care children are, and possible conditions as regards the future of the guilty parties. All these considerations are held to affect the interest of the community at large.

HUSBAND'S PETITION for dissolution of marriage.

The case was undefended.

In his petition and at the hearing on May 16, 1929, the petitioner admitted his own adultery but swore that it was originally an isolated act at a time when, as he alleged, he was deserted by his wife and that at a later date he had lived in adultery with another woman believing that his wife had obtained a divorce. The judge (Lord Merrivale P.) found the adultery of the respondent established and sent the papers to the King's Proctor pursuant to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181, sub-s. 1, for argument on the question arising under s. 178, sub-s. 3, of the same Act as to the discretion of the Court to withhold a decree from the petitioner, having regard to his adultery.

1930

Apted v. Apted and Bliss.

1930. April 15. *Sir William Jowitt A.-G.* and *Clifford Mortimer* for the King's Proctor.

[The petitioner was recalled and cross-examined by the Attorney-General and admitted with reference to his adultery that he had committed adultery during a course of years before the date of his alleged desertion by his wife, that he had not in fact been so deserted at all, and that he had not told the truth at the hearing, as he feared that his doing so would prejudice his case.]

The first essential for the favourable exercise of the discretion is complete candour on the part of the petitioner towards the Court, and if possible the circumstances under which the exercise of the discretion is sought should be stated in the petition. Next the great increase in the number of petitions in recent years and in the number of the tribunals before which they can be tried calls for some crystallization of the principles on which the discretion should be exercised, or classification of the cases meet for the exercise. Otherwise the discretion may become "a roguish thing" (1) in accordance with the length of the judge's foot. In the early period after the passing of the Matrimonial Causes Act, 1857, the exercise of the discretion was rigorously confined to three classes of cases: (*a*) innocent adultery, e.g., bigamy in the belief of the death of the other spouse; (*b*) unwilling adultery, where a wife had been forced to prostitution; and (*c*) condoned adultery, which had not conduced to the adultery of a respondent: *Morgan* v. *Morgan* (2), whilst in *McCord* v. *McCord* (3) even a petitioner who came within the last of these classes was refused a decree on the ground that his adultery was an isolated act and presented no special features. *Clarke* v. *Clarke and Clarke* (4) was a similar case.

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(1) Selden, Table Talk, *s.v.* Equity, par. 2. "Equity is a roguish thing; for law we have a measure, know what to trust to: Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. 'Tis all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot" (text amended from the Lincoln's Inn MS., see the Selden Society's edition, p. 43). —F. P.

(2) (1869) L. R. 1 P. & M. 644.

(3) (1875) L. R. 3 P. & M. 237.

(4) (1865) 34 L. J. (P. & M.) 94.

[LORD MERRIVALE P. In *Anichini* v. *Anichini* (1), in which case a husband guilty of adultery which had been condoned obtained a separation from an adulterous wife, the Court (Dr. Lushington) proceeded on the moral ground that to decide against the husband would bind him to cohabitation, a result which would be dangerous to society and morals. That seems to indicate that the view taken in the Ecclesiastical Court was less rigid than that taken at first in this Court under the Divorce Act.]

In a later case of the earlier period, *Symons* v. *Symons* (2), Sir F. H. Jeune thought that in addition to the categories referred to in *Morgan* v. *Morgan* (3) there might be added that of a petitioner whose adultery had been conduced to by the wilful neglect or misconduct of the respondent.

In *Constantinidi* v. *Constantinidi* (4) the same judge laid down that the list of causes for the exercise of the discretion to grant a decree was not a closed book and might be extended as occasion arose. In *Evans* v. *Evans and Elford* (5) Sir Gorell Barnes in refusing to exercise his discretion in favour of a guilty husband quoted with approval the words used by Vaughan Williams L.J. in *Constantinidi* v. *Constantinidi and Lance* (6): "The Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer respectively inter se but also to the interests of society and public morality." A later stage in the history of the subject is reached in the cases of *Munzer* v. *Munzer* (7), where it was laid down that even after condonation of the adultery of a petitioner the discretion would not be exercised in his favour if he gave false evidence at the hearing, and *Habra* v. *Habra*. (8) In the latter case Bargrave Deane J. negatived the application of general principles, merely affirming the reluctance of the Court to exercise the discretion except in cases when it was obviously in the interests of morality and justice that it should be exercised, and he granted relief to a husband who had disclosed his adultery to the Court and admitted it to his wife who condoned it.

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(1) (1839) 2 Curt. 210.
(2) [1897] P. 167.
(3) L. R. 1 P. & M. 644.
(4) [1903] P. 246.
(5) [1906] P. 125, 130.
(6) [1905] P. 253, 270.
(7) (1912) 28 Times L. R. 596.
(8) [1914] P. 100.

[LORD MERRIVALE P. referred to *Hampson* v. *Hampson* (1) as marking a further advance.]

The advance in the exercise of the jurisdiction of the Court by this time is further illustrated by the case of *Wickins* v. *Wickins* (2), in which the Court of Appeal refused to lay down any rule restricting the operation of the discretionary power, and in dealing with Lord Penzance's three classes of cases in *Morgan* v. *Morgan* (3) not only decided that the exercise of the discretion was not obligatory in those classes of case but further laid down that the exercise of it was not limited to these classes and that they were merely illustrations. This case may be said to mark the termination of the doctrine of defined classes of cases for the exercise of the discretion, and in *Holland* v. *Holland* (4) the Court of Appeal gives authority to what may be termed the modern view that the discretion is unfettered and that rigid rules for its exercise are neither desirable nor possible, although even so the Court held that no better rule could be laid down than that the discretion should be exercised " cautiously and carefully, and, as far as possible, consistently not only in regard to the parties themselves, but also with reference to the interests of public morality," approving the actual words used by Hill J. in the Court below. The next period of the decisions may be said to commence with *Wilson* v. *Wilson* (5), in which case the doctrine of the three categories of Lord Penzance in *Morgan* v. *Morgan* (3) was definitely departed from and new principles laid down, in recognition of the fact that society had changed. In *Bebb* v. *Bebb* (6) a husband's decree was allowed to stand on intervention after full condonation of his adultery, although he had not disclosed it at the hearing, and in *Wilkinson* v. *Wilkinson* (7) Lord Birkenhead L.C. approved the four points laid down in *Wilson* v. *Wilson* (1)—namely, the interest of children of the marriage, the interest of the woman with whom the petitioner had committed adultery, the prospect of a reconciliation of the spouses and the interest of the petitioner himself. In *Tickner* v. *Tickner* (2) the old doctrine is definitely abandoned for the new principle that provided that relief is not given to a party whose conduct has conduced to the adultery of the other party the Court should endeavour to promote virtue and morality and to discourage their opposites, and the question is stated to be this, i.e., whether the intention of the original Divorce Act was merely to substitute this Court for Parliament as a forum or to make a fundamental change in the law.

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(1) [1914] P. 104.

(2) [1918] P. 265.

(3) L. R. 1 P. & M. 644, 646.

(4) [1918] P. 273.

(5) [1920] P. 20.

(6) (1920) 36 Times L. R. 303.

(7) (1921) 37 Times L. R. 835*n.*, sub *Elliott* v. *Elliott* (1921) ibid. 834.

It is now further accepted that suppression of his or her own guilt by a petitioner if deliberate makes the Court reluctant to exercise its discretion in favour of the petitioner: *Wain* v. *Wain* (3); *Stuart* v. *Stuart and Holden.* (4) On this point the earlier case of *Hampson* v. *Hampson* (5) is also in point.

The conclusion of the matter is that there are no longer any rigid rules as to the exercise of the discretion; all relevant facts are to be considered and the welfare of the parties themselves and the principles of morality. Two negative principles have also been applied: (*a*) if the petitioner's adultery has conduced to the adultery of the other party the Court will probably refuse to exercise its discretion in favour of the petitioner, and (*b*) in the event of deliberate suppression by a petitioner the Court is disinclined to give him the assistance that it might have given had disclosure been made at the original hearing. But subject to these points the Court will take a large and merciful view, considering the interests of possible children who might otherwise be born out of wedlock and the probability of one party to the proceedings marrying the third party involved if enabled to do so by being accorded freedom from the marriage tie. In this connection the prospect of reconciliation between the husband and wife will be considered.

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(1) (1920) P. 20.

(2) [1924] P. 118.

(3) (1909) 101 L. T. 815.

(4) [1930] P. 77.

(5) [1914] P. 104, 109.

The vagueness of the statute has facilitated a large development in the Court's exercise of its discretion. It is possible that a rule of pleading is desirable enforcing the averment by a petitioner in his petition of the facts as regards his own adultery in order that those whose task it is to intervene in these matters may be informed of what has been brought to the notice of the Court.

[In the course of his argument the Attorney-General referred to a table, prepared by the King's Proctor, giving statistics of the number of cases in which the discretion of the Court had been exercised: see the judgment.]

Eric Sachs for the petitioner. [He was proceeding to refer to the intention of Parliament in passing the Matrimonial Causes Act, 1857, and to the then existing practice of the House of Lords with reference to Divorce Bills.]

[LORD MERRIVALE P. The questions for discussion to-day are those indicated in *Wilson* v. *Wilson*. (1) The discretion is at large.]

In exercising the discretion the Court will have regard to the position of a third party involved and condonation by a wife of the adultery of a petitioning husband may not always be a material circumstance, because the separation of the parties antecedent to the adultery may have rendered condonation impossible: *Schofield* v. *Schofield*. (2) In the comparatively recent case of *Grayson* v. *Grayson* (3) stress is laid on the question whether the parties are likely to marry again if at liberty to do so, and the discretion was exercised in favour of a wife who instead of taking her legal remedy in the first instance had eloped with another man.

The present petitioner denies any adultery since 1914, except that which he has now disclosed. If the Court would have exercised its discretion had the full material facts been disclosed at the hearing, the mere fact of their non-disclosure then is no ground for the rescission of the decree provided that there has been no fraud upon the Court: *Hunter* v. *Hunter* (1), referred to in *Brooke* v. *Brooke* (2) (which enlarges the category of "material facts"). *Wain* v. *Wain* (3), relied on by the other side, turned more on the delinquency on the part of the petitioner than on non-disclosure by him, and in *Wilkinson* v. *Wilkinson* (4) the test applied was the question whether the facts were such as to have justified the exercise of the discretion had they been disclosed at the hearing. Apart from the question of concealment of facts the much wider view taken at the present day should have weight. The tendency now is against debarring a petitioner from relief indefinitely. In *Pointon* v. *Pointon* (5) a petitioner was relieved from the consequence of his cohabitation in adultery for very many years.

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(1) [1920] P. 20.
(2) [1915] P. 207.
(3) (1927) 43 Times L. R. 225.

Cur. adv. vult.

May 19. THE PRESIDENT (LORD MERRIVALE). This suit was instituted by a husband's petition which alleged adultery during a period of many years between the wife and the co-respondent, admitted a like course of adultery between the petitioner and a named woman, set forth proceedings of the wife in 1919 when the wife obtained a decree nisi of divorce which was afterwards rescinded on an unopposed intervention of the King's Proctor, and sought the exercise of the discretion of the Court in favour of the petitioner on the ground of his alleged desire to marry the woman before mentioned. The respondent and co-respondent have not appeared. The case presented at the hearing appeared to raise grave questions in respect of the exercise of discretion in divorce, and the petition and evidence were submitted to the King's Proctor with a view —if the Attorney-General should so direct—that the matters in question might be properly investigated and that the Court might have the advantage of a considered argument of these questions of principle on which its discretion must depend.

Under the direction of the Attorney-General the King's Proctor took action pursuant to the Judicature (Consolidation)

(1) [1905] P. 217.
(2) [1912] P. 136.
(3) 101 L. T. 815.
(4) 37 Times L. R. 835*n*.
(5) (1922) 38 Times L. R. 848.

Act, 1925, s. 181, sub-s. 1, alleging that material facts had not been brought to the notice of the Court, and submitted for the consideration of the Court whether the decree should be rescinded and the suit dismissed. The petitioner answered the King's Proctor's plea and the matter came on in due course to be heard. In view of the public interests involved and of the burden thrown on the King's Proctor's office by the greatly increased number of such cases in recent years, the lack of certainty in many cases on matters of fact and the absence of a standard of judgment observed in all areas of this jurisdiction upon which the King's Proctor might confidently act, the Attorney-General himself presented the case for the King's Proctor, and gave his assistance to the Court by a comprehensive review of the relevant cases and a clear examination of the principles involved.

Some striking figures were presented. From 1857 to 1909 the number of the cases in which the exercise of discretion was asked was 45; between 1910 and 1919 it was 64; between 1920 and 1929 it was 690. Some observations must be made to explain this apart from the abnormal conditions which arose out of the Great War. In 1920 in a case of *Wilson* v. *Wilson* (1), hereafter mentioned, grounds of discretion were stated which went beyond those theretofore uniformly recognized. In the subsequent years enlarged rules of Poor Persons Procedure have made the Court easy of access to a large new class of suitors formerly disqualified from relief by their poverty. Since the issue of the Matrimonial Causes at Assizes Order, 1922, undefended cases and cases brought or defended under the Poor Persons Procedure have been triable on circuit and have swelled the lists in the Assize Courts. Moreover by reason of the Matrimonial Causes Act, 1923, husband and wife are on equal terms as to the grounds on which marriage may be dissolved.

The Attorney-General emphasized in his observations that by reason of the trial of divorce cases on circuit a jurisdiction which formerly was exercised in normal times by two judges in this Division, both regularly engaged from time to time in hearing matrimonial causes, comes to be exercised under novel conditions by judges whose usual tasks are of a different kind. Incidentally, too, the duties discharged here by officers of the Divorce Registry fall to be dealt with on circuit by circuit officers or district registrars, without ready means of access to the ordinary sources of information as to matters of practice and procedure. "There is," said the Attorney-General, "a real danger that the discretion in question may become a roguish thing—variable, as the length of a judge's foot." He specified as things to be desired: some sure indication of the classes of cases in which, under exercise of discretion, relief could be granted; and means available for ensuring that in each case the relevant facts may be fully put before the Court so that discretion shall be exercised upon facts duly determined. He recognized that standardized rules of discretion are impossible: as to disclosure he suggested as a wholesome rule of practice that where the exercise of discretion is sought it shall be made clear that the petitioner is under an obligation to disclose all the material facts.

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(1) [1920] P. 20.

The Attorney-General dealt with the case immediately before the Court as one in which the main facts as known rendered the exercise of discretion difficult in any view, and in which the question definitely arises what ought to be the action of the Court when a false presentment of the matters in question has been knowingly made, and when much material evidence of the petitioner is untrue and there is a serious question whether the petitioner did not cause or conduce to the conduct of the respondent on which the charges in the petition are founded.

To formulate and limit with precision the grounds on which discretion is to be exercised is, as the Attorney-General recognized, a practical impossibility; but certain broad principles can be gathered from cases which were cited, to which I will refer. Then, a judicial discretion cannot be rightly exercised except upon due ascertainment of the relevant facts, and every interest involved is a proper matter for consideration. Upon these facts a judgment is to be formed in accordance with a statutory duty. When the

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Court has used its authority to secure knowledge of the material facts, and a decree is pronounced upon due presentment of them, it must I think be assumed to be a decree based on the statutory requirements. If this decree manifestly or even apparently disregards the facts appeal lies, as in all cases when a judicial discretion is in question, though so far as I can recall no such appeal has ever yet been prosecuted where the decision was given in favour of a petitioner. I have expressed my view that the grounds on which discretion should be exercised or refused for or against a petitioner guilty of adultery cannot be rigidly defined. But it can fairly be said that their general nature and some necessary limitations have from time to time been clearly stated. The early case of *Morgan* v. *Morgan* (1) specifies cases of two distinct classes. *Constantinidi* v. *Constantinidi* (2), decided in 1903, has considerably wider scope. *Wilson* v. *Wilson* (3) ; *Wilkinson* v. *Wilkinson* (4) ; *Bebb* v. *Bebb* (5) ; *Elliott* v. *Elliott* (6) ; and *Tickner* v. *Tickner* (7) are a group of decisions in and after 1919 which show the full extent to which the Court in this Division has gone in granting relief to suitors under disability. *Wickins* v. *Wickins* (8) and *Hines* v. *Hines* (9) are modern cases in which the exercise of discretion was refused. The judgment in *Morgan* v. *Morgan* (1) expressed the considered opinion of Lord Penzance after six years' experience in the office of Judge Ordinary wherein he was the sole repository of this discretionary power. It emphasized the risks of a "loose and unfettered discretion". . . . "formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed," and the learned judge laid down, that "the discretion to be exercised should be a regulated discretion and not a free option subordinated to no rules." This, so far as I know, has not been called in question by any judge. Lord Penzance declared further that the "duty of reducing to method" the exercise of the discretion "devolves upon the Court." "Past experience," he said, "has already pointed out some classes of cases to which it is fitly applied; and the future may probably furnish more."

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(1) L. R. 1 P. & M. 644.

(2) [1903] P. 246.

(3) [1920] P. 20.

(4) 37 Times L. R. 835n.

(5) 36 Times L. R. 303.

(6) 37 Times L. R. 834.

(7) [1924] P. 118.

(8) [1918] P. 265.

(9) [1918] P. 364.

So far as the judgment in *Morgan* v. *Morgan* (1) specified grounds of discretion, it is founded upon the following statement: "there is no doubt I think that the legislature has invested this Court with a discretion, and there is equally no doubt that there are cases in which the adultery of the petitioner has been committed under such circumstances that it ought not in justice to stand in the way of a decree." The learned judge identifies with certainty two classes of cases only: where the respondent had induced the petitioner to believe she was dead, and where the husband had forced the wife to lead an immoral life. The grant of relief in such cases is, I think, unquestionable upon a broad principle of English law apart from the powers of the Court under the statute in question. They seem to depend rather on the principle of estoppel than on the judicial discretion, and if this is a true view they are not illustrations which guide with certainty in the identification of the cases of the future to the occurrence of which Lord Penzance looked forward. It is remarkable, too, that a well known case in which discretion in favour of a petitioner had been applied in the Ecclesiastical Court some years earlier was not accepted in *Morgan* v. *Morgan* (1) as coming clearly within the law. In *Anichini* v. *Anichini* (2) it had been held in respect of divorce a mensa et thoro to be a ground for the exercise of judicial discretion in favour of a petitioner that an act of adultery of which he had been guilty had been long since pardoned and condoned. Lord Penzance did not include a case of this class as a clear case for the exercise of discretion. He reserved his judgment on the matter. *Anichini's* case (2) has since been regarded as a decision proper to be followed. The judgment in *Morgan* v. *Morgan* (1) stands on a different footing from that in *Wilson* v. *Wilson* (3), with which it is commonly contrasted. *Wilson* v. *Wilson* (3), however, does not go further, in point of principle,

(1) L. R. 1 P. & M. 644.
(2) 2 Curt. 210.
(3) [1920] P. 20.

than the judgment of Sir Francis Jeune, P. in *Constantinidi* v. *Constantinidi*. (1) Sir Francis Jeune set forth the following propositions: the discretion conferred by the statute is a judicial and not an arbitrary discretion: the causes for the exercise and the circumstances under which it may be exercised in favour of a guilty petitioner are to be taken in combination and according to their several degrees of force: the list of such causes is not inclusively and exclusively ascertained by the terms of the statute. Sir F. Jeune at the same time laid down as rules of decision founded on clear principles of justice that a petitioner who has been guilty of adultery should not be allowed to obtain a divorce if such adultery in any serious degree contributed to the misconduct of the respondent and (conversely) that the respondent should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of the petitioner for which the respondent was himself or herself in any serious degree responsible. Sir F. Jeune had been twelve years engaged in the work of this Division when he decided the case of *Constantinidi* v. *Constantinidi*. (1) The judgment provoked comment at the time. It must, I think, be recognized nevertheless as of high authority.

In *Wilson* v. *Wilson* (2) facts which were defined as material for consideration were the interests of children affected by the petition, the position of a mother under whose care and control such children live, and existing and possible conditions as to the guilty parties, and these considerations were held to be relevant and admissible not only as affecting the interests of the individuals directly concerned but as affecting the welfare of the community.

Wilson v. *Wilson* (2) was considered and approved by Lord Birkenhead L.C. in *Wilkinson* v. *Wilkinson* (3), and followed in practice in other cases which I have already mentioned by, among other judges, Horridge J. and McCardie J., both of whom had during long periods sat in this Division.

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(1) [1903] P. 246.

(2) [1920] P. 20.

(3) 37 Times L. R. 835*n.*, sub *Elliott* v. *Elliott* ibid. 834.

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Wickins v. *Wickins* (1) where, as I have said, the exercise of discretion was refused, was the case of a husband whose unjustifiable separation from his wife had preceded her adultery and probably had conduced to it. In *Hines* v. *Hines* (2) each of the spouses had been guilty of adultery, and the Court found on the facts of the case no "exceptional circumstances" which should lead it to relieve the petitioner of the disability under which he lay. Neither case is of material assistance here.

Reviewing the cases in question as a whole these principles appear: in every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration; a strong affirmative case is necessary before a judge is justified under the statutes in negativing their conditional prohibition; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality; if it is not unlikely do so that is an argument against leniency. Every person familiar with legal procedure who reads the modern cases to which I have referred will find that the matters I have mentioned were actively present in the minds of the judges concerned.

The observation inevitably presents itself that problems such as those I have endeavoured to define are not on the face of things peculiarly fit for solution in the course of a busy day on an Assize circuit. This is a difficulty inherent in the conditions under which the modern extended jurisdiction in divorce became necessary. In the exercise of the jurisdiction here, however, cases are often adjourned for further consideration. Circuit cases in civil disputes, as every one knows, are often so adjourned. When there is such adjournment the Court can secure here the help of the King's Proctor, and if deception is practised there are six months before decree absolute during which the truth may appear. The cases cited do not dispose of the whole matter. Relevant facts receivable in evidence vary infinitely in

(1) [1918] P. 265. (2) [1918] P. 364.

character and relative weight. Their bearing and value cannot be rightly judged unless a clear view is had of the constant and unchanging elements common to all—the common law, the status of marriage and statute law as to divorce.

In spite of modern legal changes and whatever social developments there have been in recent years, marriage under the common law is still in its essence "a voluntary union for life of one man and one woman to the exclusion of all others which gives a new status to the spouses." Dealing with the statutory safeguards contained in the Matrimonial Causes Acts Lord Penzance in *Mordaunt* v. *Mordaunt* (1) formulated this question: "Is it true that marriage is an ordinary contract?" and answered it thus: "Marriage is an institution. It confers a status on the parties to it, and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilized society is built; and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it." That the status or, in older phraseology, honourable estate of matrimony is under English law no figure of speech, cannot be much more distinctly emphasized than it is in the statutory enactments as to divorce. They abound in clauses which confer or define the material rights of married persons—and especially married women—by virtue of the marriage tie. Nothing less than the concern of the State in the integrity of the marriage tie could account for the profound difference there is between the permitted liberty of procedure in ordinary civil litigation inter partes and the statutory conditions which prevent dissatisfied spouses from dealing as they will with their marital relationship. A husband petitioning must make the alleged adulterer a co-respondent; a wife complaining may be required to take a corresponding step. The Court must direct its attention not only to the facts alleged but to the

(1) (1870) L. R. 2 P. & M. 109, 126.

questions whether the petitioner was accessory to or conniving in the adultery alleged, or has condoned it. If the affirmative is shown the petition must be dismissed. If the Court finds that a petitioner has committed adultery, or has been guilty of unreasonable delay in proceeding, or of cruelty or desertion or "such wilful neglect or misconduct as has conduced to the adultery" the Court is not bound to pronounce a decree: Supreme Court of Judicature (Consolidation) Act, 1925, ss. 177, 178. Since 1860 divorce is never summarily decreed. Six months elapse between decree nisi and decree absolute, and since 1860 the King's Proctor has had power to intervene: Matrimonial Causes Act, 1860.

The statutory provisions to which I have referred, all of them re-enacted in 1925, express a consistent legislative view as to marriage and divorce during upwards of seventy years, and reference to authority will show that some outstanding prohibitions contained in the Matrimonial Causes Act, as re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, are moulded upon the procedure which governed parliamentary proceedings in bills for divorce when divorce was obtainable only by statutory enactment. The judicial discretion which is in question has to be exercised with due regard to the code of law under which it subsists.

Put the disability due to misconduct of the suitor at its maximum force, and take it that the statute provisionally prohibits the grant of a decree to the suitor so disabled, yet if good cause be shown within the intent of the statute for waiver of the prohibition the decree can properly be granted, and it will not usually be refused.

The task of determining with due regard to the interests of the community and of innocent third parties the proper course to be taken where relief is sought under this discretionary power, is facilitated if the material facts are known with reasonable certainty. The practice of the Court is intended to secure this, but experience has shown it to be difficult and in recent years increasingly so. Parties are naturally

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loath to disclose their own ill-doing. As between a petitioner and a respondent who are both to blame there is also an inevitable tendency to collusion, though collusion is itself a bar to divorce if it be discovered. With a procedure which is designed to enable litigants who are entitled to relief to secure it, some elementary safeguards against deceits or deceptions practised by suitors of a different sort have always been necessary, and from time to time these safeguards need to be reinforced.

No divorce suit proceeds to trial until a registrar has certified that the proceedings in the suit are in order. When the exercise of the discretion is asked it is necessary to set forth that fact in the petition in order that the case may in due course find its place in the appropriate cause list and not need to be adjourned at the hearing. The discussion which has taken place in the present case has made it clear that in the interests of straightforward suitors no less than for securing dispatch, certainty and finality in all suits where discretion is prayed, the fact shall be stated in the petition, as is commonly done now, and there shall be lodged with the application for the registrar's certificate a statement of the matters in respect whereof the exercise of the discretion is prayed and the grounds on which the petition in this behalf is based. The official form of application for a certificate will as from this time set forth these requirements. This being done, no petitioner can hereafter reasonably assert when his case comes to be heard that he has been under any misapprehension as to what is required of him.

While guidance is given to the petitioner as to procedure to be observed, it is proper at the same time to mention consequences which follow—or may follow—wilful disregard or abuse of the procedure. There is a general assumption that the sole penalty for suppression of fact, or presentment of falsehood, in cases such as this, is the allowance of the King's Proctor's intervention, rescission of the decree nisi and the dismissal of the suit, with an order for payment of costs—an order not infrequently found incapable of enforcement. This is not an adequate view of the matter. One of the safeguards of legal procedure in this country is the prescriptive authority of Courts of record to visit with summary punishment persons who purposely obstruct or divert the course of justice. The not doing what the party is commanded or required by lawful process to do has always been within the area of liability for contempt of Court. An early recorded example is *Royson's Case* (1), where a man of straw tendered as bail in a civil court made a false oath of means, and was forthwith attached. A false plea of infancy intended to delay an action was dealt with in like manner: *Lord* v. *Thornton*. (2) Parke B. in an opinion delivered in the House of Lords in *Miller* v. *Knox* (3) described commitment for contempt as "a summary remedy for obstructions in the course of justice." In a case of *Smith* v. *Bond* (4) Alderson B. is reported as saying: "Persons giving false testimony in Court are frequently committed for contempt." At a comparatively recent date a member of the Bar who was party to the reading to the Court of a false affidavit was held guilty of contempt and imprisoned: *Linwood* v. *Andrews and Moore*. (5) I set forth these things in detail because the present case is one of flagrant abuse of procedure such as calls for a reminder to suitors that the summary processes I have mentioned are in being to-day and that the offence of contempt committed in presence of the Court can be punished without resort to any specific criminal procedure.

In the present case at the hearing of the suit counsel on the express instructions of his client represented the petition to be that of a man deserted by his wife while he was on active service during the Great War, when so deserted guilty of one isolated act of adultery and later led into cohabitation with a woman other than his wife under an erroneous belief that his wife had procured a divorce. The petitioner supported the case so presented by his sworn testimony.

When the issues raised now came on for hearing the petitioner went into the witness box again to give evidence

(1) (1628) Cro. Car. 146.
(2) (1614) 2 Bulstrode, 67.
(3) (1838) 4 Bing. N. C. 574, 614.
(4) (1845) 13 M. & W. 594, 596.
(5) (1888) 58 L. T. 612.

in support of his case as presented. Then, under pressure of cross-examination, based manifestly on precise information, he admitted marital misconduct of a gross kind during a course of years prior to his alleged desertion by his wife, sexual promiscuity aggravated by the fact that at the time it occurred he was living with his wife and their young children. So far from being deserted by his wife, in 1917 from his Army quarters in an answer to a letter of hers (which asked his reasons, as he said, for "refusing to live with her again") he wrote: "You can do as you please"; "I have been unfaithful to you not once but many times since we parted in August, 1914. . . . . The thing that troubles me is the kiddies, but then I'm sure you will let me see them sometimes." What the petitioner did in presenting his case he did with full knowledge of his obligations. When his petition was newly presented he had written to the respondent saying he was assured by his solicitors of the probable success of his suit, "if we do not attempt to keep anything back." Under cross-examination his excuse for the various falsehoods he admitted was that he feared the truth might go against his case.

Three distinct matters require to be dealt with: the prayer for the exercise of a favourable discretion upon such facts as are now proved; the effect of the petitioner's conduct in the suit as it affects or may affect the judgment of the Court upon the petition; and the responsibility which lies upon every judge of so far as he may preventing unlawful interference with the course of justice.

As to the admitted falsehoods of the petitioner it has been said on various occasions when falsehoods of petitioners have been exposed that in such cases the Court may properly consider whether on a true statement of the facts in the first instance the discretion would have been exercised. I do not dissent from this view subject to the provision that it presupposes the Court to have at length learned the true facts. In the present case there is no reasonable certainty of this. As to merits, what appears now is that so far as the facts have been examined the present case falls within

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a ground of decision stated by Sir Francis Jeune in *Constantinidi* v. *Constantinidi* (1) : the petitioner's adultery was antecedent to that of the respondent, and such as was likely to contribute in a serious degree to her misconduct of which he complains.

There is no interest of innocent parties, or, as far as I can see, of the community, which warrants an exceptional order. Most of the wrong that the petitioner has done he has done knowingly and wilfully. The co-respondent in the suit, it appears, is also a married man. Having regard to the nature and limitations of the discretionary powers of the Court I am unable to exercise a discretion in the petitioner's favour.

The petitioner must be condemned in the costs of the intervention on the usual scale in such cases.

I find the petitioner guilty of contempt of Court. If he proceeds promptly according to his means to meet the pecuniary penalty he has incurred it may not be deemed necessary in this case to take specific action upon that finding. That is a matter the King's Proctor can consider.

Solicitors : *The King's Proctor ; Judge & Priestley.*

(1) [1903] P. 246.

R. M. M.

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June 24.

KITCAT *v.* KING AND ANOTHER.

Probate—Will and Codicil—Words in Codicil—" This is the last will and testament "—Construction of Codicil—Signatures of Four Persons at Foot of Codicil in Addition to that of Testator—Two of Signatories Beneficiaries under Codicil—Both Papers admitted to Probate—Signatures of Beneficiaries omitted from Probate.

A testamentary paper headed " Codicil to be attached to my will," and proceeding " This is the last will and testament of A. B. " did not expressly or by implication revoke an earlier will although it effected a substantial difference in the destination of a large portion of the property passing. The same paper bore, in addition to the signature of the testator, the signatures of four persons, two of whom were beneficiaries under it; all four signatures had been placed on the paper at the time of attestation, and there was evidence that the two beneficiaries signed otherwise than as attesting :—

Held, that the words " last will and testament " did not preclude the admission to probate of both papers, and that probate of the codicil might go without including the names of the two beneficiaries as attesting witnesses.

THE plaintiff, as executor, propounded the will dated July 26, 1906, with a codicil dated May 10, 1929, of Amelia Chappell Hall, spinster. The plaintiff further sought omission from the probate of the names of two persons who signed the codicil along with others below the signature of the deceased. The deceased by her will, which was prepared by a solicitor, gave her residuary estate upon trust to pay the income thereof to her sisters Louisa Ann King and Laura Lavinia Hall for their lives and to the survivor for her life and subject thereto in trust for the children of L. A. King. These children were Aubrey John King and Violet Amelia King. The codicil, which was a home-made document, was headed " Codicil to be attached to my will " and proceeded as follows : " This is the last will and testament of me Amelia Chappell Hall signed and witnessed this day the 10th day of May 1929 I leave to my nephew Aubrey John King my property at the Gibb and all my property at Sherston and to my niece Violet Amelia King my property at 49 Quarrington Road, Horfield, Bristol."

There followed the signature of the testatrix and lower down and after the following words in the margin—namely, "Signed and witnessed in the presence of each other," the signatures of four persons—namely, Aubrey John King, Laura Lavinia Hall, Violet Amelia King, Louisa Ann King. These persons were those previously mentioned. The defendants were the sisters of the testatrix, L. A. King and L. L. Hall, whose interests under the will were affected by the codicil, which practically diverted the whole estate except a small sum from the operation of the will. The defendants submitted to the judgment of the Court and further asked for the omission from the probate of the word "Last."

The short effect of the evidence as to the codicil was that V. A. King wrote it out at the request of the testatrix and that the four other signatories signed it at one sitting in the presence of the testatrix, and that A. J. King and V. A. King, who were the beneficiaries under the codicil, signed it to show approval and to "make it legal." There was nothing to show that the testatrix desired to revoke her original will. An order had been made that the same solicitors might act for all parties.

H. D. Grazebrook for the plaintiff. As there is still property passing under the will unaffected by the codicil and nothing to show that the testatrix desired to revoke her will or the appointment of the executor the Court will upon the construction of the codicil disregard the words, "This is the last will and testament," etc., occurring in the codicil and admit both will and codicil to probate together. The principle is that of the decision in *Simpson* v. *Foxon.* (1) The names of the beneficiaries A. J. King and V. A. King as attesting witnesses should be omitted from the probate. Provided that the necessary two attesting witnesses to a testamentary paper are forthcoming the Court will not insist on redundant signatories being assiduously regarded as attesting witnesses: *Sharman, In the Goods of* (2); *E. J. Smith, In the Goods of.* (3) The question is whether the signatory signed with the object of attesting. The effect of the evidence is that A. J. King and V. A. King did not do so in the present case.

H. B. D. Grazebrook for the defendants.

(1) [1907] P. 54.
(2) (1869) L. R. 1 P. & M. 661.
(3) (1889) 15 P. D. 2.

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Bateson J. I think that the codicil of May 10, 1929, is a testamentary paper made by the deceased and that it can properly stand with the will of July 26, 1906. Although there are these words in the codicil, "This is the last will, etc.," the document is headed "Codicil," and I think that it is a testamentary paper which can be read with the will. It is quite clear that the testatrix intended the paper to be part of her testamentary disposition. I think that *Simpson* v. *Foxon* (1) shows the principle to be followed. The testatrix, evidently desiring to have the original will slightly altered so as to give property to the children of Louisa Ann King directly, got her niece Violet Amelia King to write out her wishes. Violet accordingly wrote out the paper now before the Court and V. A. King and her brother A. J. King then proceeded to sign the paper along with the two attesting witnesses after the testatrix had signed the paper. The testatrix was quite competent to execute the paper. I am satisfied on the evidence that the two children of L. A. King did not intend to sign as attesting witnesses. Indeed one of them V. A. King expressly stated in evidence that she signed to "make it legal." I think that their intention was merely to express assent to the testatrix so dealing with the property. The other two parties who have signed the will apart from the testatrix were sisters who took life interests in the property by the original will but were quite willing that the children of one of them should take the property directly. The two sisters were competent attesting witnesses and their signatures made it a good execution, A. J. King and V. A. King only signing by way of verification of the contents of the document. I think that the present case in this respect is an instance in which I can apply the principle of *E. J. Smith, In the Goods of.* (2) Probate will go of both papers omitting the signatures of A. J. and V. A. King as attesting witnesses.

Costs of all parties as between solicitor and client out of the estate.

Solicitors for all parties: *Wood, Nash, Hewett & Riddett, for Paul & Kitcat, Tetbury.*

(1) [1907] P. 54.

(2) 15 P. D. 2.

R. M. M.

STEPHEN *v.* STEPHEN.

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June 30.

Divorce—Practice—Maintenance—No Case shown for present Order for Maintenance of Wife—Liberty to Apply—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-ss.* 1, 2.

The intention of the statute, the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, is finally to determine, as far as possible, the financial arrangements of spouses whose marriage has been dissolved. The provisions of sub-s. 2 of the same section with regard to payments for maintenance and their variation apply in the case of a respondent husband whose income is a fluctuating one, but not to cases in which the figures denote a set state of affairs and disclose no present case for the making of any order for the maintenance of the wife. In cases of the latter description liberty to apply for maintenance at a future date when the means of the husband may be increased should not form part of the order.

Adjourned Summons.

The petitioning wife obtained a decree nisi for the dissolution of her marriage on the ground of the adultery of the respondent husband, which was made absolute on December 9, 1929. In due course the petitioner presented a petition for permanent maintenance. There were two children, aged respectively four and two years of age, of whom the petitioner had the custody. Under a marriage settlement executed on the marriage of the parties, each of them took an income of 500*l.* for life, and the survivor one of 1000*l.* for his or her life, arising from funds provided by the husband's father. At all material times the respondent had been in receipt of net earnings amounting to about 350*l.* per annum. The petitioner had some small means of her own amounting to about 25*l.* per annum. On this basis the registrar made an order that the respondent should pay to the petitioner by way of maintenance of the children 120*l.* per annum free of tax. The order proceeded: "No order for the maintenance of wife, but liberty to apply thereon." The respondent appealed to the judge in chambers against so much of the order as gave liberty to apply for maintenance of the wife. The summons was adjourned into Court for argument.

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STEPHEN v. STEPHEN.

Noel Middleton for the respondent. The words giving liberty to apply should be expunged from the order. They offend against the rule that permanent maintenance must be applied for at the time of or within a reasonable time after the decree for dissolution of the marriage: *Scott* v. *Scott.* (1) The words of the preamble to the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), though now repealed, as a matter of history compel to the same conclusion. "And whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives," etc. This makes it clear that the husband's ability to give security is to be investigated once for all and, if necessary, that an order to pay should be substituted once for all.

The Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), repealed and re-enacted by the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190, whilst enlarging the Court's powers as to orders for payment has not altered the principle of the legislation which is to secure finality as far as possible in fixing the husband's liability.

H. B. D. Grazebrook for the petitioner. *Scott* v. *Scott* (1) is distinguishable. The Court of Appeal was there dealing with an application out of time requiring the indulgence of the Court. The order in the present case should be amended by directing a nominal payment to the wife to keep the jurisdiction alive, and the amount could be subsequently varied under the Judicature (Consolidation) Act, 1925, s. 190, sub-s. 2, should the husband's means increase.

THE PRESIDENT (LORD MERRIVALE). The present is one of a class of cases which, from time to time, cause difficulty to the registrars in disposing of petitions for maintenance. It appears that the joint income of the parties amounts to 1375*l.* or thereabouts. Of this sum 1000*l.* is derived from

(1) [1921] P. 107.

a marriage settlement made by the father of the husband of which each spouse takes 500*l.* for his or her life with mutual survivorship. In addition the husband's earnings at all material times came to 350*l.* per annum, or thereabouts, and the wife had also a small amount of income of her own. For the purpose of an order for permanent maintenance on the usual scale, it is obvious that the means of the wife exceed the amount of any order that would ordinarily be made on the basis of the total joint income. The application therefore failed, but it is said that the husband may be better off in time to come, and that accordingly there should be facilities for then making further application in respect of his increased means.

In the view that I take of the effect of the statutes, their object is that when the marriage tie is put an end to, the future relations of the parties as to money matters are then to be finally determined. It is quite true that within recent times provision has been made whereby when the husband is a wage-earning person a maintenance order may be enlarged. This husband is not a wage earner, and no case is presented here of a fluctuating income. The figures of the case denote a set state of affairs. The question is whether I should insert in the order the words that the appellant complains of, in order to postpone the allotment of maintenance. In the present case no cause is shown for keeping the matter open, and I order the words " Liberty to apply " to be expunged from the order.

Wife's costs. Leave to appeal refused.

Solicitors for the petitioner : *Edgar Hammond & Co.*
Solicitors for the respondent : *Valpy, Peckham & Chaplin.*

R. M. M.

C. A.

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July 22, 23, 24, 25.

THE CHATWOOD.

Shipping—Collision—River Scheldt—Vessel turning in River—Duties of approaching Vessels—Scheldt By-laws, 1909, *art.* 40, *r.* 3.

By art. 40, r. 3, of the Scheldt By-laws a vessel turning in the river must give the appropriate signal, and every vessel in the vicinity ("proche") proceeding against the tide must stop her way over the ground, and every vessel proceeding with the tide must slacken her speed, until the vessel turning no longer presents any obstacle "au passage."

The appellants' steamship *C.*, a collier, bound up the Scheldt with the tide, had ahead of her the steamship *A.*, which sounded the appropriate signal, that she was going to swing to get head on tide. The respondents' vessel *B.*, one of the Harwich and Antwerp mail boats, was coming down the river at her full speed of 14 knots. She saw the lights of the *C.* coming up astern of the *A.*, and when she got down towards the *A.*, which was blocking about half of the navigable waterway of some 1000 feet, she saw the lights of the *C.* coming under the stern of the *A.* on the *B.'s* side of the waterway. The *B.* kept her speed until about one minute before the collision when she slowed, and, about half a minute afterwards, stopped and went full astern.

The President absolved the *B.* from blame for the ensuing collision on the ground that art. 40, r. 3, did not apply to her under the circumstances, as there was ample waterway for her on her own proper side of the river under the stern of the *A.* He held that the *B.* was justified in keeping her speed "until her master saw that there was an element of risk in the turning movement of the *A.* combined with the oncoming of the *C.* but before that risk had developed." He held the *C.* alone to blame for over-starboarding into the water of the *B.* and for not sounding a signal that she was starboarding. The owners of the *C.* appealed:—

Held, that art. 40, r. 3, is directed, not to the moment when the approaching ships get up to the turning ship, but to the time when they are coming towards her and do not know where she may be when they get up to her; that the ship coming against the tide cannot excuse herself by saying that when she arrived in the vicinity of the turning ship there was in fact room for her to pass; (per Greer L.J.) that r. 3 is a regulation for the purpose of ensuring the safety of vessels navigating the river at the time the turning movement is taking place quite as much as it is directed to the safety of the turning vessel herself, and that the rule has to be applied until the turning vessel no longer presents any obstacle "au passage"; and (per Curiam) that while the *C.* was to blame, the *B.* was also to blame for keeping her speed and not stopping and reversing her engines until the risk of collision was apparent.

Decision of the President varied by holding both vessels to blame in equal degrees.

Appeal by the defendants, the owners of the steamship *Chatwood*, against a decision of the President (Lord Merrivale), holding their vessel alone to blame for a collision which took place on the night of October 11, 1929, in the River Scheldt with the plaintiffs' steamship *Bruges*.

The *Chatwood*, a collier of 2768 tons gross, was bound up the river on the flood tide, and the *Bruges*, a steamship of 2949 tons gross, running in the regular Antwerp–Harwich mail service, was bound down the river. Coming up ahead of the *Chatwood* was the Swedish steamship *Atland*, which sounded the appropriate signal that she was about to turn in the river to get head on tide.

By art. 40, r. 3, of the Scheldt By-laws printed in French (1) and Dutch, the turning vessel must give the appropriate signal, and every vessel in the vicinity proceeding against the tide must stop her way over the ground, and every vessel proceeding with the tide must slacken her speed, until the vessel turning no longer presents any obstacle "au passage."

The *Chatwood*, according to her case, was proceeding up at about 9 knots, and, on hearing the turning signal of the *Atland*, reduced her engines to slow speed. The *Bruges* maintained her speed of 14 knots until a much later period. The details of her navigation are set out in the following passages from the judgment of the President.

His Lordship found the *Chatwood* to blame for "a violent alteration under starboard helm," which brought her into her wrong side of the river and across the course of the *Bruges*, and also for not signalling that she was starboarding. He absolved the *Bruges* from blame, as he held that the waterway at its narrowest point material to the case was 1000 feet wide, and that there was a clear way between the

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(1) The French text of art. 40, r. 3, of the Scheldt By-laws, 1909 ("Règlement pour la navigation sur la section de l'Escaut comprise entre une limite située à un kilomètre en amont de l'extrémité Sud des quais d'Anvers et la frontière néerlandaise") is as follows:—

"Lorsqu'un bâtiment faisant route avec le courant veut virer, il doit donner connaissance de son intention aux bâtiments à proximité par un son continu, suivi d'un ou de deux sons brefs suivant qu'il désire éviter sur tribord ou bâbord. Dans ce cas, tout bâtiment proche remontant le courant doit arrêter sa marche par rapport au fond et tout bâtiment proche naviguant avec le courant doit diminuer sa vitesse, jusqu'à ce que le bâtiment qui vire ne présente plus d'obstacle au passage."

Bruges' port side and the stern of the turning *Atland* "at any rate of between 400 and 500 feet." The governing words of r. 3 of art. 40, in his opinion, related to the obstruction of the waterway, and any questions which might arise under that rule were put out of the case by the position of the *Atland ;* and if the question of the *Bruges*' speed had a reflex action upon the operation of the rule it did not place upon her a greater obligation than was imposed by the rules of good seamanship. She was proceeding down at 14 knots and she kept that speed until about one and a-half minutes before the collision. She slowed "when her master saw there was an element of risk in the turning movement of the *Atland* combined with the oncoming of the *Chatwood*, but before that risk had developed." He then stopped and went full speed astern. "The *Bruges* had not timely and effective warning of the *Chatwood*. She had in front of her a turning vessel, and, until the action of the *Chatwood* when she made her start over to the east side, the *Bruges* had no cause for apprehension." The *Chatwood* had then drawn up close to the *Atland* and came on showing her starboard light to those on the *Bruges*, and the master of the *Bruges* then decided it was prudent to take action. The Elder Brethren took the view, which his Lordship accepted, "that the slowing of her engines was a sufficient precaution, and that she acted with promptitude and judgment when she stopped and went full astern." The *Chatwood*, therefore, was alone to blame.

The owners of the *Chatwood* appealed.

C. R. Dunlop K.C. and *Alfred Bucknill* for the appellants. The President did not give effect to the local rules. Art. 40, r. 3, of the Scheldt By-laws required the *Bruges* to stop until the obstacle to her passage no longer existed. She was to blame therefore (1.) for maintaining her speed of 14 knots until one minute before the collision, and then (2.) for merely slowing instead of stopping and reversing. The rule requires both vessels to act. Scrutton L.J. in *The Hontestroom* (1), referring to the Thames Bye-laws, said that r. 36 under which the vessel navigating against the tide on approaching sharp bends shall ease, and, if necessary, stop, disposed of the argument that there is a side of the river which belongs to the up-coming ship and a side which belongs to the down-coming ship, "and that as neither of them ought to be in the water of the other you go straight ahead because no other ship has a right to be in that half of the water." The *Bruges* should have stopped under the rule when good seamanship required it, i.e., in sufficient time to enable the *Chatwood*, coming with the tide, to pass the turning *Atland* and then pass the *Bruges* port to port. The *Chatwood* was not to blame. The "violent starboarding," found by the President, could not have taken place, and even if she had blown the starboard helm signal, for the absence of which she has been condemned, those on the *Bruges* would not have paid any attention to it even if they had heard it. But even if she was negligent that negligence was not the effective cause of the collision. The *Bruges* with her powerful engines could pull up in 40 seconds, in one of her own lengths, and, therefore, could have avoided the collision until a very late moment. The rule in Admiralty is the same as at common law: see *The Vectis* (1), and on the principles laid down in *Davies* v. *Mann* (2) the *Bruges* is alone to blame.

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(1) (1925) 22 Ll. L. Rep. 458, 464.

[GREER L.J. referred to *The Volute.* (3)]

Langton K.C. and *Naisby* for the respondents. There was no obstacle to the passage of the *Bruges*. She had not to stop and keep back at any given place. Art. 40, r. 3, only refers to the duties owed to the turning vessel and puts her in a favoured position. The *Atland* was not "an obstacle" to the *Bruges*, whose master was not called on to assume that the *Chatwood* would be negligent. But for the starboarding of the *Chatwood* there would have been no collision, and the President was right in his conclusion that the *Bruges* acted with sufficient promptitude when the danger manifested itself.

C. R. Dunlop K.C. replied.

Cur. adv. vult.

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(1) [1929] P. 204.
(2) (1842) 10 M. & W. 546.
(3) [1922] 1 A. C. 129.

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The Chatwood.

July 25. Scrutton L.J. This is an appeal against a judgment of the President, with Trinity Masters, who has held, in a collision between the *Bruges* and the *Chatwood*, the *Chatwood* alone to blame. He absolved the *Bruges* from liability, and the *Chatwood* appeals.

The case lasted six days in the Court below, and involved a long judgment from the President, after consulting the assessors. In the view I take of the case, the problem can be reduced to a short one, although it involves points of considerable difficulty, as to which my mind has fluctuated during the course of the hearing.

The simple elements of the problem are these: the collision is in the Scheldt at night. The *Bruges*—the Harwich mail steamer running a regular course twice a week between Harwich and Antwerp—was going down the river; the *Chatwood*—a moderately large tramp ship, over 300 feet long, laden with coal—was coming up the river. The time was just before high tide; the flood was still running, and the President finds—and I see no reason to dissent from his view—that it was a two-knot tide, but it was getting near high water. But for the incident I am about to mention there would have been no trouble. The *Bruges* would have come down, and the *Chatwood* would have gone up, on their respective proper sides, and would have passed—although it was on a bend—port side to port side. The trouble is that on the bend there is a dock—apparently a dock recently opened—and coming up ahead of the *Chatwood* was the *Atland*, a heavily laden Swedish steamer, 380 feet long; although, of course, being night the other vessels did not know exactly what length she was, except that she was showing two masthead lights, and, therefore, was over 300 feet long. The *Atland*—as she had a right to do—was going to swing head to tide, and continue her turn either directly, or very shortly, across to the eastern bank of the river in order to go into the Kruischans Dock. The trouble has arisen from the fact that both the *Bruges* and the *Chatwood* arrived in the neighbourhood of the *Atland's* turning, at a time when she was undoubtedly blocking half the channel at least. Under these circumstances they contrived to run into each other, and the question is who is to blame.

Now, the navigation in the Scheldt is governed by a by-law which is far more in favour of the turning ship, and far harder on the up and down going ships which are near her, than any by-law I have come across. It is much harder than the Thames by-law which imposes considerable liability on the turning ship herself. In my view this case largely falls to be determined upon the construction that the Court puts upon art. 40, r. 3, of the Scheldt By-laws, apparently made by the Belgian Government, and applying to that part of the river which is in Belgian territory. Questions have been raised before us—and were raised still more in the Court below—as to the application and meaning of art. 40, r. 1, which, as I read it, is a by-law regulating the relations between the up-going and the down-coming ships in certain situations which are mentioned, without regard to other ships, in the sense that they are very indirectly concerned. I am not stating this as an authoritative definition of its meaning, but it applies to cases where ships are near a " chenal "—whatever that may be (1)—or a bridge, or a stopping place—which may be a jetty or merely a place where steamers tie up—or a bend where the passage is so narrow that there would be danger for both to go into it at the same time. The Court below expressed an opinion about the application of that rule. In my view it is not necessary to deal with that clause of the article in this case, because the difficulty here is—what is the position when, in addition to the down-coming and the up-going ship there is a ship turning between them. That particular case seems to have been expressly provided for by sub-rr. 3 and 4. The first of those deals with the case when there is a tide running, and the second with the case when there is no tide running—which must be a very limited time, such as at the top of high water. Dealing with the last case first, at the very limited time when there is no tide, what the rule says is quite clear: the up-going or down-coming ships

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[(1) It appears to include both natural creeks and artificial cuts opening into the main channel.—F. P.]

have to keep out of the way of the turning ship. They must, in case of need, give place to her, and that puts the turning ship, of course, in a much better position than she is under most by-laws, and in most rivers, with which I am acquainted. When there is no tide ships coming up and going down must keep out of the way of the turning ship.

When one comes to the more usual case when there is a tide it cannot be provided for in that simple way, because the ship coming with the tide will be in great difficulty. If she tries to stop herself over the ground, she will lose steerage way. On the other hand, the ship coming against the tide will be able to hold herself up over the ground by the use of her engines against the force of the tide that is running. So, in the case where there is a tide, r. 3 deals with the two ships differently. It deals, first, with the turning ship—I am using the word "turning" for the French word—what the Dutch word is I do not know. The French is "virer," and "virer"—which looks like our word to "veer"—seems to me to mean turning or swinging. It is suggested that it may also mean "heave to." (1) It is particularly applicable to the case where a ship coming up with the tide wants to go into a dock on the other side of the river, and, as a preliminary, swings round to get head to the tide. The ship that proposes to do that, which is what the *Atland* was proposing to do, must give notice of her intention to ships "à proximité." "Proximité," of course, is a word which has a wide meaning. There is some difficulty in knowing when a ship is "à proximité," but when a notice has been given, the vessel coming against the tide must stop her progress over the ground—"arrêter sa marche par rapport au fond"—and the vessel navigating with the tide must reduce her speed until the ship which is turning no longer presents any obstacle "au passage." Now whether "au passage" means the passage of both ships, or the passage of the one ship in whose water the turning ship is not, may be a troublesome question. But the view I take of the rule is that it is not directed to the moment when the up-going and down-coming ships get up to the turning ship. It is directed

[(1) This does not seem possible.—F. P.]

to the time when they are coming towards her, and do not know exactly where she will be when they get to her. They are told, it seems to me, by the express direction—just as they are told in r. 4—to give place to her in case of need, and that I think means this: you see a ship turning ahead of you; she occupies a certain part of the channel, and you cannot be sure how much; you are some way from her, and to avoid any risk of speculating whether she will or will not be clear when you get to her, the ship coming against the tide has to stop herself over the ground. She will then not get into any trouble. The ship which is coming down with the tide—which is in the difficulty of stopping herself over the ground—is to lessen her speed so as, as far as possible, to give way to the turning ship. The material time seems to be not when you get there and say "this is all right, I have chanced it and it has come off," but before you get there and when you do not know what exactly is happening; you are to hold your ship up so that there may not be any trouble by her getting there at the wrong time. That I take to be the meaning of art. 40, r. 3. Each ship is to keep away from the turning ship so that, the width of the channel being interfered with by the turning ship, there will not be any difficulty created by two ships trying to get through the same limited channel.

It is common ground—because one now comes to see what the two ships did—that each of them knew seven minutes before the collision that the *Atland* was turning. The collision happened seven minutes after they, either by signal or sight, knew that the *Atland* was turning off the Kruischans Dock. What did they know about the *Atland*? She was in fact a ship 380 feet long, and the width of the channel there is about 1100 feet. They did not know the 380 feet, but they knew she was over 300 feet because they saw the masthead lights on two masts. They saw she had a tug, and the President finds, with the advice of the Elder Brethren, that 30 fathoms of tow rope is about the length the tug would be having—there is 180 feet more. The tug, in the opinion of the President and Elder Brethren, would be about 70 feet long. If you add those three figures together and if the tug was in a straight line with the *Atland*—you have got 630 feet, considerably more than half the channel. Of course it is improbable that the combined line would be 630 feet, because, if the vessel is turning, the tug will be towing on one bow and one cannot be sure of the angle. The angle between the two being considerable it may be that it is much less than 630 feet. Also, the approaching ships cannot be sure of the exact angle across the river. When they get up to this turning ship they cannot be sure where in the river she will be because it is found, and accepted, that the ordinary way for a vessel of that sort, coming up with the tide, to turn, would be to get over to the east side of the river out of her proper water and then begin to turn, the tug towing on her starboard bow, and, at a certain stage, holding her head, while the tide swings her stern round. That would mean that when her head has got eight points round, and she is right athwart the river, half her length—190 feet—would have swung out towards the eastern side, possibly in the western side, but possibly partly into the east. At the time of this actual collision she had swung round twelve points, and she would have reduced that 190 feet by 95 feet. It seems to me that the dangerous time—the time they have got to think about—is when she has swung the eight points and is taking up most of the river. Her engines may, or may not, be working. In this case a three-blast signal was heard showing she was going astern. When I say "going astern" it may be they were checking her headway, but she was using her engines for the purpose of going astern, and it seems to me quite impossible for a vessel some way off, knowing that the ship is turning, to be sure where they will find her when they have got to the place where she is. In addition there is nothing requiring the turning ship to stop when she is straight and not go into dock. She is turning for the purpose of going into dock, and it may be when they get there they will find her coming across into the dock, and they must take that into account as part of the turn which they may find when they get up to her.

Now what did the two ships do when they either heard the turning signal or saw the lights of the turning ship? The

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master of the *Bruges* says that he never heard the turning signal, but he did see the lights. The pilot of the *Bruges* says that he did hear the turning signal. What did they do ? The *Bruges*, seven minutes before the actual collision, as we know now, went full speed ahead at 14 knots for about six minutes. I say " about," because the times are taken to half a minute and they may be between the minute and the half minute. She had seen that there was a vessel coming up the river with the tide, behind the *Atland*, so she knew that there might be danger of another ship—a ship that had only to diminish speed and not to stop over the ground. For six minutes she went on at full speed 14 knots, till about a minute before the collision. There was a difference of opinion between the master and the pilot as to what should be done. The pilot was going to say " half speed." The master said " no, slow." She did not stop, and she went on at slow till just before the collision, and she only stopped and reversed within half a minute before the collision, and she is found to have some 3 or 4 knots headway. She went on and did some damage—not so much as is alleged by the *Chatwood's* witnesses—to a dolphin which was ahead of her. Does that comply with the rule that every vessel near, going against the tide, shall stop her way over the ground ? It seems to me clear that it does not. She has so regulated her speed that she is arriving at the place of collision close to the turning ship. She has not stopped at all till the *Chatwood*, coming up, is very nearly into her. Why did the captain of the *Bruges* do that ? He expresses his views on the subject as follows : " Was there anything to prevent you from waiting above the place of collision ? (A.) Nothing to prevent me. (Q.) You have twin screws ? (A.) Yes. (Q.) And you could have kept her under complete control ? (A.) Yes. (Q.) And could have brought yourself up, according to you, within a very short distance, if you had been so minded ? (A.) Yes. (Q.) But you were determined to go on and pass through the gap ? (A.) I had my passage to make—mails and passenger trains to catch. (Q.) And you wanted to make the best passage you could with your mails and with your passengers ?

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(A.) Yes. (Q.) And you had a fast ship? (A.) Yes." Mr. Dunlop then suggested to him that if he had waited by slowing sooner the *Chatwood* would not have collided with the *Bruges*. "(A.) Not with the *Bruges*, no, but do you realize, Sir, that I took account that we overtook and passed nineteen ships from Antwerp to Flushing, and passed twenty-three ships that were going up the passageway? (Q.) You are proud of your speed? (A.) No, but I only wish to impress it upon you that had we stopped for every ship we should never have caught the mail or passenger train. (Q.) But if the rule requires you to stop and wait and stem the tide? (A.) Naturally, if I thought there was any danger or risk of collision, I would most decidedly rather risk losing the train. (Q.) Do you mean that, unless there is in your view a risk of collision, you are at liberty to keep on because you are carrying passengers and mails? (A.) If we can do it without any risk to other ships." Again, when he is asked "Why, in your deposition when you state the circumstances of the collision, do not you mention the existence of the *Atland* at all?" he says: "The *Atland* I took as being clear of me and she would not affect me."

In my view the master of the *Bruges* took quite a wrong view of his position under the rules. He treats his vessel as one which, carrying mails and passengers, should not slacken speed unless she is absolutely obliged to, because she has got to catch the trains on the English side. He speculates, takes the risk, goes on fast, and hopes it will go all right. He does not read the rule as requiring him to stop if there is a turning vessel ahead of him at a distance when he cannot be sure where he will find her when he gets to her. He seems to have thought it sufficient—and the learned judge and Trinity Masters below seem to have thought it sufficient—if when he gets there there is in fact room, no matter what has been happening during the previous time and no matter what the risk was of the turning ship being in the way in going into the dock. In my view that is a wrong reading of the rule. The rule requires the approaching ship, when there is a risk some way off—when she does not know what will happen, and sees a turning ship, to lessen that risk, if she is going against the tide, by stopping her way over the ground, and if she is going with the tide by going slow until she is sure what the position is. From that point of view, on the admitted facts—I will refer to the advice we have received from our assessor in a moment—it appears to me that the *Bruges* broke the rule.

What about the *Chatwood*? She is in a more difficult position, coming up with the tide, than the vessel that is going down against the tide, which can stop her way over the ground by means of her engines. The vessel coming up with the tide, if she tries to stop her way over the ground, will be in the position that she has lost steering way and will find herself in considerable difficulties. The learned judge says: " In the particulars I have mentioned, as it seems to me, there can be no doubt that the *Chatwood* was to blame." The learned President is condemning the *Chatwood* for two things. In the first place he was induced by an argument of Mr. Langton—of which Mr. Langton has now repented—to form the opinion that the *Chatwood* made what the learned judge called " a violent alteration," " a great divergence," from her course of 7 points to port of her up-river course, and, holding that view, the learned President condemned the *Chatwood* for that violent alteration. Secondly, finding there was this violent diversion he has said: " You never signalled your starboard helm. It is true that you blew a starboard helm signal when first you heard the turning signal of the *Atland*, but when you made this violent divergence you made no signal at all and all you say is "—as Mr. Dunlop has said to us—" what is the good of blowing any signal to the *Bruges*? She does not pay any attention to it, if she hears it, so I need not blow a signal "—which again is speculation as to what the master of the *Bruges* will or will not hear—speculation of a dangerous character. The trouble we have had about this is that it turns out, both as a matter of arithmetic and as a matter of looking at the chart and seeing what must have happened, that that violent divergence of 7 points to port cannot have happened. It was arrived at in this way. Mr. Langton said to the captain of the *Chatwood*: "Assume the angle of the blow—which the President afterwards found—as 3½ points, and you say that when you ultimately starboarded your helm you got round 3½ points; add those two three and a half's together and you have got 7 points, and you must therefore at some time have been 7 points off your up-channel course." The difficulty about that, and what is wrong with it is, that it assumes that the *Chatwood* was off her up-channel course, whereas it is clear from the course made, and from the repeated statements of her captain, that she never diverged from that course, that she was on an up-channel course, but was heading to starboard of it for the Beacon light. Once that is so the 7 points is gone. Mr. Langton gave up a point and a half of it—he may have to give up more—but at any rate there was not a 7 points divergence. It seems to me there is something much stronger than that. When the course that the *Chatwood* must have been following is looked at, and it is remembered that before buoy No. 56, where the bend began, she must have been coming along, as she says, in mid-channel, on a straight course—which would have taken her ashore well above the Kruischans Dock—she must have over-ported her helm. Nobody but a lunatic would have gone straight on, because it would have taken the ship straight ashore in a very short time. She must, therefore, when she got to buoy No. 56 have over-ported, as she could, by the proper calculation of porting, have passed between the *Atland* and the eastern shore, without any starboarding at all. Yet she says she starboarded not 7 points but slightly—a point. It is obvious therefore that she had to starboard so much by reason of her having over-ported, and she could not get round straight up the river but went into the *Bruges*. When one looks at the course which Mr. Langton laid down on the chart, as representing his argument as to what happened, it is clear that the fault of the *Chatwood* was not a 7 point starboarding —which cannot have happened unless it is assumed that the *Chatwood* went up nearly touching the *Atland* and then got round nearly at right angles—but a faulty judgment in over-porting, and then a starboarding to try and correct the over-porting.

It appears to me that the *Chatwood* is first of all to blame for that over-porting and consequent starboarding which brought her into collision with the *Bruges* well over on the eastern side of the river. Secondly, when she starboarded she did not give the starboard helm signal, and it was all the more necessary that she should do so, because when one looks at the chart, and visualizes the position of the *Atland* and the *Bruges*, one sees that the *Atland* was between the *Bruges* and the *Chatwood*, and consequently the *Bruges* would not have the opportunity of sighting very accurately or of judging what the *Chatwood* was doing, and would require a helm signal to tell her that the vessel which is coming up, and which she cannot see because of the *Atland*, has starboarded. There are two things to be considered: first, the *Chatwood* laid a wrong course, because she over-ported, having regard to the *Atland* ahead of her; secondly, she starboarded at such speed that she could not get round but went right over to the eastern side; and thirdly, when she did that starboarding she did not give a helm signal to tell the vessel above what she was doing. Mr. Dunlop argued that the *Atland* gave her turning signal when the *Chatwood* was so near her that the necessity for starboarding was forced upon the *Chatwood* suddenly. That excuse turns upon the question as to how far the *Chatwood* was from the *Atland* when the *Atland* gave her turning signal. The learned President has found that to be at least half a mile—I think it was quite possibly a little further. If that was the position, the *Chatwood* was practically at buoy No. 56, and had ample time to judge of the situation and port the right number of degrees. Therefore, it appears to me that the *Chatwood* is obviously also to blame.

The fault of both vessels is that neither of them paid any attention to the rule. The rule tells them to give way to the turning ship and keep out of the way as long as she is turning, and they both came on at a time when the turning ship was obstructing at least half the river, and when they could not be sure which half, or which part of it, would be obstructed.

If, as might easily have happened, the *Atland* had completed her turn, and had started to go into dock, the *Bruges* would have been in a very bad position. She could not possibly tell that that was not what the *Atland* would do; similarly the *Chatwood* could not be sure of what the *Atland* was doing. She had blown a 3-blast signal showing that her engines were working astern, and she had started on the east side of the river, and, probably just at the time when the *Chatwood* had to decide, the *Atland* had made her 8-point turn, and was more across the river than she would be at a later period.

For these reasons, on the construction of the rule, and the admitted facts, I came to the conclusion myself that both vessels were to blame, and I saw no ground for distinguishing the blame between the two—they seemed to me to have equally disregarded the rule. The construction of the rules is for the Court, and not for the assessors, though no doubt sometimes the assessors may make very valuable remarks which may assist the Court in the construction of the rules. Unfortunately illness during the course of the case deprived us of the valuable assistance of one of our advisers, and the parties agreed to go on with one rather than delay the case for a second assessor to be brought in. We asked our other assessor these questions: "Was the *Bruges* justified (1.) in keeping full speed of 14 knots till about a minute before the collision while the *Atland* was turning and the *Chatwood* was coming up stream? (2.) In not stopping and reversing till just before the collision when the *Atland* was still turning and the *Chatwood* was on the eastern side of the channel—(*a*) as a matter of good seamanship, assuming r. 40 (3.) applies; (*b*) as a matter of good seamanship, assuming r. 40 (3.) does not apply?" Our assessor answered in this way: "(*a*) Assuming that r. 40 (3.) does apply, (1.) the *Bruges* was not justified; (2.) The *Bruges* was not justified in postponing reversing her engines until after the risk of collision was apparent. (*b*) Assuming r. 40 (3.) does not apply, (1.) the *Bruges* was justified in maintaining her speed until the risk of collision became apparent, but, although she was justified in doing so, she would have shown a better interpretation of good seamanship and prudence if she had allowed as much room as possible to on-coming ships by taking more drastic action when the necessity did arise by getting sternway."

The second question that we asked our assessor was this: "Was the *Chatwood* justified, when she saw the *Atland* turning, in proceeding on such a course and at such a speed that she passed the *Atland* in the eastern half of the channel at a time when the *Bruges* was close approaching in the same half of the channel, and came into collision with her in the extreme east of the channel?" The answer that our assessor gives to that is: "The *Chatwood* was not justified in the manner in which she shaped her course and speed across the river which made her a danger to the *Bruges* or any other approaching vessel."

As we have held that art. 40, r. 3, does apply, the answers of our assessor confirm the view to which I myself had come, and the result, therefore, is that both ships are held to blame, and in equal proportions.

LAWRENCE L.J. I entirely agree, and do not think I could usefully add anything to the judgment given by my Lord.

GREER L.J. I agree that the judgment of this Court should be that both vessels were to blame for the collision and its consequent damage.

I think it unnecessary to say anything on the question whether the *Chatwood* was in fault, because the Court below, the Trinity Brethren, and my Lord and our assessor, have come to the conclusion that the *Chatwood* was to blame, and it would be a waste of time for me to add anything further on that subject.

The important question is whether the *Bruges* was also to blame, and that depends not merely on the true meaning of art. 40, r. 3, but it depends, or may depend, upon the question—whatever the meaning of that rule—did not the *Bruges* behave in such a way as the Court deems to amount to negligent navigation under circumstances for which she was to blame? With regard to the meaning of art. 40, r. 3, I am inclined to take a somewhat wider view of its meaning than that which was indicated in my Lord's judgment. These regulations relate to the navigation of the Scheldt, and I suppose it is right to say that, like the regulations which in this country are called Regulations for the Prevention of Collisions at Sea, they are at any rate regulations for the prevention of accidents arising in the course of the navigation of the Scheldt. The Scheldt is in places a narrow highway which is very much used by vessels large and small. An illustration of that was given by the evidence of the master of the *Bruges*, when he said that on his way from Antwerp to Flushing he overtook and passed nineteen vessels and he met and passed twenty-three vessels coming the other way. It is a matter of grave importance that there should be regulations which will enable vessels coming up and down safely to navigate the river. One of the difficulties that vessels coming up and down may have to encounter is created when they are approaching a vessel which is turning in the river to get round. In my opinion r. 3 is a regulation for the purpose of, so far as possible, ensuring the safety of vessels navigating the river at a time that these turning movements take place, just as much as it is directed to the safety of the turning or swinging vessel. The rule has got to be applied until the turning vessel no longer presents an obstacle to the passage—"au passage." I think that those words are directed to secure that the rule shall be obeyed until no difficulty remains in the navigation of the river by reason of the turning movement. The turning movement may have gone so far that there is no risk to either vessel even though the turn has not in fact been completely made, and if it has gone so far that there is no risk to any vessel coming up or down then I think the rule no longer has any application.

That being the rule, this case, so far as concerns the conduct of the *Bruges*, seems to me to depend upon certain vital facts which may be shortly stated. Seven minutes before the collision both vessels heard the signal of the *Atland* and knew that a turning movement was about to take place. Neither vessel knew how long it would take the

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Atland to perform that turning movement. Neither vessel could know where exactly the moving obstacle would be in the channel when they got up to it, and, from the moment they realized that a turning movement was going to take place, it was the duty of those in charge of both vessels to exercise the greatest care in their navigation from that time. But from that time until just shortly before the collision the *Bruges* did nothing except continue her full speed in the hope that there would be sufficient room for both vessels where the turning movement was taking place. In not slowing before she did I think that she was to blame. But there are other facts which make her conduct more seriously to blame than the fact that she did not slow in time. She could stop in her own length when at full speed; her own length was 331 feet. If she was slowing at the time when she reversed her engines she could obviously stop in something less than 331 feet. But what happened was that she did not stop until practically at the moment of the collision when the stopping and reversing could have been of no importance except, possibly, to diminish the force of the blow when the two vessels came into contact. The next vital fact is this: if the captain of the *Bruges* is to be accepted as a witness whose statements can be treated as accurate, it is plain that when he was at least a quarter of a mile away—and it may be more—he saw that the *Chatwood* was coming round the stern, or commencing to come round the stern, of the *Atland*. He did not immediately do anything even then, though it must have been apparent that at that time he was within the area indicated by the word "proche" in the rule; he did not even slow. I think it is clear that he ought to have stopped and reversed; but what he did was to wait till he heard the signal which almost immediately followed his seeing the vessel coming round the stern of the *Atland*; he waited until he heard the signal from the *Chatwood* that the *Chatwood* was going astern; and it was only when he got that signal that he then slowed his engines. If even at that time, having regard to his power of stopping, he had stopped and reversed there would have been no collision.

It seems to me impossible, under these circumstances, to find that the *Bruges* was not to blame for this collision and its consequent damage.

Mr. Dunlop invited the Court to find, on the principle that we follow in dealing with common law cases, as laid down in *Davies* v. *Mann* (1), that the *Bruges* ought to be held alone to blame, because she was guilty of the final negligence which occasioned this collision and its consequent damage. At one time that argument rather appealed to me, but, in the result, I have come to the conclusion that the vessels had got so near to one another at the time when the extent of the negligence of the *Chatwood* was apparent, or would be apparent to those on board the *Bruges*, that this is one of those exceptional cases which are referred to in *The Volute* (2), when things are happening so rapidly that it is right to say that the collision, and the consequent damage, were the joint effect of the negligence of the two vessels. I agree with my Lord that the circumstances here are such that we ought not to distinguish between the two vessels and that they ought to bear the result of their negligence in equal proportions.

Appeal allowed.

Solicitors for the appellants: *Botterell & Roche.*

Solicitors for the respondents: *Parker, Garrett & Co., for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

(1) 10 M. & W. 546. (2) [1922] 1 A. C. 129.

E. C. M. T.

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
Printed by W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C.4.

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